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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 82

LEE ARTHUR HESTER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Writ Of Certiorari To The Supreme Court of Illinois)

BRIEF FOR RESPONDENT

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THE PEOPLE OF THE STATE OF ILLINOIS,

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(On Writ Of Certiorari To The Supreme Court of Illinois)

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether The Admission Into Evidence Of Statements Of The 14 Year Old Petitioner Violated The Fifth, Sixth, Or Fourteenth Amendments.

II. Whether The Guilt Of Petitioner Was Established Beyond A Reasonable Doubt.

III. Whether This Court Can Consider An Alleged *McNabb-Mallory* Violation Which Was Never Presented To The Courts Below.

IV. Whether The Rule Requiring An Expert Medical Witness To Base His Opinion On Hypothetical Questions Derived From Properly Admissible Evidence Violated The Petitioner's Right To A Fair Trial.

V. Whether The Work Sheets Used By A Chemist In The Compilation Of The Report That Was Submitted To The Defense Should Have Been Produced At Trial.

VI. Whether The Arrest Of Petitioner And The Subsequent Examination Of His Clothing Was Based Upon Probable Cause.

STATEMENT OF THE CASE[1]

On April 20, 1961 at about 4:00 P.M. the body of Josephine Keane, a Chicago school teacher, was discovered by school personnel in the first floor book room of the Lewis-Champlain Elementary School, 320 W. Englewood, Chicago, Illinois (R. 215-216). Mrs. Keane had been stabbed repeatedly in the side and chest. That she had been sexually molested was also apparent. The police were summoned immediately. Dr. Harold Wagner of the Cook County Coroner's office also arrived at the scene. After making a preliminary examination he ordered the body to the morgue where an autopsy was performed the following day. At the trial Dr. Wagner's testimony, based on his autopsy, fixed the time of death between 8 and 12 A.M. on April 20, 1961 and the cause of death as hemorrhaging caused by the multiple stab wounds (R.1450-1464).

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1. The Petitioner suggests that "There can be no controversy concerning the accuracy of [his] statement of the case" (Br. 14-15) claiming that since the Respondent did not offer a separate version in its Brief opposing the Petition for a Writ of Certiorari and relied for the limited purposes of opposition on the facts contained in the opinion of the Illinois Supreme Court and the Petition, Respondent is somehow precluded from further comment. To this suggestion, Respondent replies only that it does not consider itself so bound and believes a disservice would be rendered to this Court and the issues presented in this case if it did not submit a statement of the case in light of the character and highly argumentative nature of the Petitioner's Statement of the Case.

At about daybreak on the morning after the murder, Detectives Sheldon Teller[2] and Anton Prunkle arrived at the Lewis-Champlain schools where they conducted a search of the premises until about 7:45 A.M. Then they had a discussion with Virginia Fritsch, a teacher, who informed them that she had seen the Petitioner, Lee Arthur Hester, running down the hall alone on the morning of the murder (R. 1082-1085). The detectives inquired as to whether there might be any connection between the Hester boy and Mrs. Keane. Miss Fritsch informed them that Mrs. Keane was reportedly handling a disciplinary case involving Hester and directed the officers to Rita Considine, a clerk in the principal's office, for more information on that subject (R. 1086-1087).

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2. In a professional attempt to comply with Rule 40 of this Court in particular regard to freedom from irrelevant, immaterial, and scandalous matter [40 (h) (5)] the Respondent refrains from a direct reply in the main body of its Brief to an insidious attempt by the Petitioner to enlarge, distort, and altogether mislead concerning the role of former Detective Sheldon Teller of the Chicago Police Department in this case. The Respondent offers no justification for any criminal conduct engaged in by Detective Teller subsequent to the events of the Keane murder. However, Teller was only one of two arresting police officers in this case and his official role went no further. Clearly, it is totally misleading, as well as useless in advancing the cause of the issues to be decided herein, for the Petitioner to devote the amount of space and argument, as he does in his Brief, to the post-trial conduct and affairs of Detective Teller. Without a doubt it borders on being ridiculous, if not scandalous, for the Petitioner to conclude and claim that: "It cannot be overemphasized that it was . . . Teller who set in motion all of the events that culminated in the petitioner's conviction." (Br. 96).

Rita Considine advised Detectives Teller and Pruneckle that Hester was reportedly the subject of a sex complaint registered by another student's parents. This information came to Rita Considine from Josephine Keane (A. 147, R. 1080). Upon hearing this, the detectives went to the third floor classroom of the petitioner, accompanied by Miss Fritsch, where they met Jean Webster, Hester's teacher (R. 1088).

When Hester arrived at approximately 8:00 A.M. Detectives Pruneckle and Teller spoke with him for about 15 minutes outside his classroom (R.1173). At this time the detectives noticed what appeared to be bloodstains on his shirt and pants. The officers asked him how he got the stains and the petitioner gave them the following assorted and conflicting answers: that he got them in a fight with another boy; that he had a nosebleed; that he cut himself with an axe while chopping wood; that he was sawing wood and cut himself with a saw (R. 1126). The detectives then accompanied Hester to the balcony of the school auditorium where bright sunlight was coming through the windows and they could more closely observe the condition of his clothing (R. 1185).

The Petitioner then returned to his classroom, picked up his coat, and rejoined the officers who were waiting

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The other references to and characterizations of the credibility and veracity of Sheldon Teller in the Petitioner's brief will not be further challenged or rebutted save the following: It is significant to note that after the conclusion of the State's case in chief the Petitioner made a motion for a directed verdict of not guilty. (R. 2101). In the course of a long and extensive argument ranging over all the circumstances of the murder, arrest, and trial, and covering practically all the major personalities involved, Detective Teller was *never* mentioned once. Suffice it to say that Sheldon Teller's role in this case has apparently and without justification grown with the passing years.

for him outside the assembly hall door. They then took him down to the principal's office on the first floor and turned him over to Sergeant Frank Follis, a youth officer, at about 8:45 A.M. Thus far Hester had denied any involvement in the Keane slaying (R. 1126; 1139-1140). The Petitioner sat outside the principal's office until about 9:00 A.M., when Officers Thomas and Perkins picked him up and transported him to the Audy Home where they arrived at about 10:00 A.M. The defendant was not interrogated between 8:45 A.M. and 10:00 A.M.; nor had he made any admissions with reference to the slaying. Upon arrival at the Audy Home, Hester's clothes were turned over to Officers Thomas and Perkins for removal to the Crime Lab and the defendant was provided with clothing by the Audy Home (R. 265-268; 311-322; 472-475). Thomas and Perkins left the Audy Home and did not return there until about 4:00 P.M. in the afternoon. After changing his clothes Hester was placed in a room in the Audy Home Infirmary. The Petitioner described his room as a "dungeon room" though he admitted that the room had a bed with a blanket and clean sheets, and that he laid on the bed (R. 550-554).

The Petitioner remained in the room alone and was never interrogated by the police during this time. At noon, Petitioner was given lunch. Hester admitted receiving lunch but claimed he did not eat. At about 4:00 P.M. he was escorted to the interview room of the Audy Home where he saw officers Thomas and Perkins again as well as Sergeants Keating and Killackey. The four officers remained with the Petitioner for about 5 minutes and asked him if he had anything to do with the death of Mrs. Keane. When he denied the killing he was confronted with the results of the Crime Lab tests of his

clothes which turned up a hair, human blood on his clothes and a lipstick smear on his jacket. Hester again denied his guilt.

Officers Keating and Killackey retired leaving the Petitioner alone with Officers Thomas and Perkins. Thomas and Perkins urged him to "get it off his chest" (R. 779-780). Hester then admitted the slaying but said it was an accident. He then related how the "accident" took place (R. 375-378).

Acording to the Petitioner, on Thursday, April 20, he was with Sherman Baker carrying out milk cartons to trash cans. He saw Mrs. Keane bending over a set of books in the book room, opening a package. Her back was to the door. He told Sherman Baker to go up on some stairs and Hester then walked into the book room and tripped over a set of books. Hester carried a knife secured to his arm by rubber bands. As he tripped the knife came into his hand, his hand came around and he stabbed Mrs. Keane in the right side of the back. Both he and Mrs. Keane landed on the floor. Hester tried to get up a couple of times but each time he slipped and each time that he slipped he stabbed Mrs. Keane. Finally Mrs. Keane rolled over. Hester then stabbed her a few times in the chest. After this Hester cut her garters and panties and laid down on top of her. He stated that he did not insert his penis in her vagina, but did admit "squirting" a little. Then he leaned over her to see if she was still alive. He did not hear any heart beat. He then took the keys to the room, walked out of the room, locked the door and dropped the keys somewhere in the school. Later in the day he threw the knife into a lot where they were moving sand and rock (R. 375-379, 991-993, 1891-1895, 2013-2014).

Officer Perkins left the room at about 4:15 or 4:20 P.M. and Officer Killackey returned. Thomas asked the Petitioner to repeat his story for Killackey which he did. Perkins then returned to the room with pictures of the murder scene (R. 787-788) and showed them to Hester who pointed out certain items in the pictures which he had mentioned in his statement. At about 4:30 to 4:45 P.M., Mr. Jordan, the Superintendent, came to the interview room and took the petitioner to another room where he was examined by the Audy Home medical personnel.

Assistant State's Attorney Louis Garippo arrived at the Audy Home at approximately 5:30 P.M. in the evening of the 21st. At approximately 6:30 P.M. he met with the Petitioner in the office of the State's Attorney in the Family Court Building. Court reporter Donald Flannery was present at that time as was Sergeant William Keating of the Chicago Police Department. Mr. Garippo had a conversation with Hester at the time, which was reduced to writing by Flannery. Hester repeated his statement admitting the sex assault and slaying of Mrs. Josephine Keane. Flannery wrote up the statement and returned three copies to Garippo at about 8:15 P.M. Garippo gave one copy each to the Petitioner and Sergeant Keating, keeping the third for himself. He read the statement slowly to Hester after the latter had told him he could read. As they read along the Petitioner noted several mistakes in the transcript which he pointed out. These were subsequently corrected and initialed by the Petitioner. Hester also initialed each page and signed the statement on the last page (R. 1998-2000).

At trial, the State offered evidence that Hester had what appeared to be a knife in school on Thursday, April 20 (R. 1366-1367). Further, three school children testified

that Hester and Sherman Baker did carry out milk cartons sometime after ten in the morning on that day (R. 1279, 1318, 1334). The carrying out of milk cartons was assigned to Sherman Baker and it was his privilege to select another boy to help him (R. 2411). Petitioner contended that Lorenzo Walker had helped Sherman Baker on April 20. All of the Petitioner's witnesses on this point were severely impeached. On April 21 at the Audy Home when Hester said, "Sherman, I took the milk cartons down with you on Thursday", Sherman Baker admitted that he started crying (R. 2450-2451). Another witness said he did not remember who took the milk cartons down on Thursday but he was told by defense counsel to ask Sherman Baker and Lorenzo Walker about it (R. 2925-2928). Lorenzo Walker, a defense witness, had stated on April 25 that Lee Arthur Hester had helped Sherman Baker with the cartons on Thursday (R. 2928).

Dr. Harold Wagner testified that the time of death was between eight A.M. and noon on April 20. He testified that the vaginal swab and slide taken from Mrs. Keane contained many spermatozoa (R. 1459). The Crime Lab analysis of the swab and slide confirmed this finding (R. 1732). Dr. Wagner was of the opinion that the four stab wounds in the right side, under the right arm at the lower end of the rib cage were inflicted before the three stab wounds in the front of the chest (R. 1457-1461). The defense called Dr. Joseph Campbell who testified on the basis of a hypothetical question that the wounds in the front were inflicted first. Dr. Wagner testified that Mrs. Keane's right palm had a smudge of dirt resulting from her hand striking the floor (R. 1457, 1487-1489), thus indicating that Mrs. Keane was attacked from the rear.

The State showed that Mrs. Keane's panties and garters were cut (R. 1476). Semen, which was estimated to be approximately 24-30 hours old on the afternoon of April 21, was found on the underwear of the Petitioner (R. 1727-1728).

Bloodstains on Hester's clothes were found to be human blood of Type A (R. 1752). Mrs. Keane's blood was found to be Type A (R. 1745). The Petitioner's blood was Type O (R. 2070). The Petitioner offered evidence to the effect that the testing of the bloodstains was inconclusive as to type (R. 2657).

A hair with human blood on it (R. 1748-1749) was found on Hester's clothing and was compared to hairs from Mrs. Keane's head and an expert testified that it was very, very remote that the various hairs came from a different origin (R. 1648-1655, 1719-1720). Lipstick traces found on the Petitioner's jacket were similar in all respects to one of the lipsticks Mrs. Keane had in her purse on April 20 (R. 1765-1767).

A metal filing found imbedded in Mrs. Keane's clothing was found to consist of silver and a plastic coating. Metal filings found in Hester's pockets were similar and were found to consist of silver and a plastic coating (R. 1784-1788).

At the close of the evidence and after argument the jury found the Petitioner guilty and fixed his punishment at fifty-five years in the penitentiary.

The facts are further elaborated in the argument.

SUMMARY OF ARGUMENT

The confessions in this case were clearly given within constitutionally permitted limits. Applying the "totality of circumstances" test to the statement of Petitioner, it is readily apparent that the voluntariness and trustworthiness of the confessions cannot be seriously questioned. Considering the limited police questioning of less than an hour, together with the testimony elicited on the motion to suppress the confessions, it becomes manifest that the circumstances surrounding the questioning of the Petitioner in no way suggest coercion of any sort.

The calling for the imposition of a *per se* exclusionary rule as to a youthful offender's confession is merited neither by the facts of this case nor any constitutional doctrine heretofore announced by this Court. Furthermore, such a conclusion and holding would adversely effect the already precarious balance within our criminal justice system. In addition, already existing standards regarding juvenile confessions adequately protect the rights of those involved when one considers the burden the prosecution carries in attempts to establish the freedom of such statements from constitutional defects.

The Petitioner stands convicted of a vicious crime by overwhelming testimonial and scientific evidence. There exists absolutely no measure of reasonable doubt that would justify inquiry by this Court into an area where the Supreme Court of Illinois gave extensive and complete review. Attacks made by Petitioner in this Court on the sufficiency of the evidence collapse when compared with the record made below.

The claim that the Petitioner's post-arrest custody violated the constitution because he was not promptly taken before a magistrate for a preliminary hearing is not properly before this Court. Since this point was never presented below, either at trial or on appeal, the Respondent suggests that this Court is without jurisdiction to consider the question.

The psychiatric testimony sought to be introduced at trial by the Petitioner was both incompetent and improperly offered. Neither from the evidence in the record, nor from any examination of the Petitioner, was the offered psychiatric testimony correctly derived and the trial judge properly excluded such self-serving and worthless testimony.

The scope of discovery allowed in this case precludes any conclusion other than one which shows that the defense had access to the records and statements of all State witnesses and a complete freedom of inquiry regarding the nature of the State's case. Considering the Illinois adoption of the Jencks Act rule, and the application of the same to this case, the claim of discovery limitation is without merit.

The Petitioner's arrest was grounded in more than sufficient probable cause because the facts and circumstances made known to the arresting officers mandated their actions. In addition to information obtained from reliable citizens, the arrest of the Petitioner was supported by his physical appearance, connections with and knowledge of the deceased, and his response to the initial pre-custody

general inquiry. Thus, any acquisition of his clothes by police officials was not the result of an illegal search, as the Petitioner suggests, but rather the incident of a custody which was constitutionally permissible.

ARGUMENT

I.

THE ORAL AND WRITTEN CONFESSIONS GIVEN BY PETITIONER TO THE POLICE WERE FREELY AND VOLUNTARILY MADE AND DUE PROCESS DOES NOT COMMAND THE ABSOLUTE EXCLUSION OF JUVENILE CONFESSIONS TAKEN OUTSIDE THE PRESENCE OF COUNSEL.

(Answer To Petitioner's Points I (a), I (b) & II)

The arguments made by Petitioner concerning the validity of his confessions under Points I(a) and (b) of his Argument are interwoven, and, at times, confusingly so. Thus, in his Summary of Argument, Petitioner states "The confessions must therefore be excluded either under the conventional principles . . . in the factual situation here" (Br. 15-16), and then, "or because *due process* and the *fundamental fairness* it encompasses is violated by the *incommunicado* taking of a confession *from a child*" (Br. 16) (emphasis added); and, finally, "or (and this is the preferable rule) because the confessions of children must be *per se inadmissible* so that there shall not exist the right to take a confession from a juvenile, at least where the same can be used in a criminal proceeding against him" (Br. 16) (emphasis added). A constitutional rationale for this last contention is not stated[3].

Similarly, in the body of his Argument, Petitioner first says that "The mere taking of a confession from such an

3. Petitioner does, however, make some later reference to "untrustworthiness" and the supposed inefficacy of *Miranda* warnings for juveniles. See Br. 16.

individual as Lee Arthur Hester is violative of due process even if the safeguards described in *Miranda* v. *Arizona*, 384 U.S. 436, are scrupulously adhered to" (Br. 24). The argument then immediately recedes to the lesser proposition that "The petitioner was so young and so incapable that to take a confession from him *in any manner* should cloak the same with the *presumption* of *involuntariness*" (Br. 24-25) (emphasis added).

Petitioner next argues that the "totality of circumstances test . . . if properly applied by the Supreme Court of Illinois, would have resulted in reversal of the petitioner's conviction" (Br. 26). This, in turn, is followed by the claim that "There is therefore, no doubt that where a defendant is as young as Hester is, the rule of law to be applied (without regard to the requirements of *Miranda* v. *Arizona*) is that *irrespective of the pressure applied* to bend the will, *failure to provide counsel* (or some other friend) will render a confession taken during secret detention of one so young inadmissible" (Br. 33) (emphasis added). The argument then advanced is that this Court held in *Application of Gault*, 387 U.S. 1 (1967), that confessions taken from juveniles without *Miranda* warnings are "'testimonially untrustworthy' (at 387 U.S. 45) and must be excluded from evidence" (Br. 35)[4].

Next follows a general complaint about the adequacy of the Illinois procedural formula employed to test the

4. This Court did not so hold in *Gault*. Petitioner's quoted reference comes, not from this Court's language in *Gault*, but from Wigmore's discussion of the ancient, and now discarded, rule of "untrustworthiness", where no reference either to juveniles or to the privilege against self-incrimination is made.

voluntariness of confessions both generally and in its application to this case (Br. 38-40). The argument is then made that the confessions must be rejected under the "totality of circumstances" rule because "credence" must be given to petitioner's controverted testimony of coercive threats (Br. 40-41)[5]. And, finally, under Point 1(b), Petitioner specifically argues for the application of a *per se* rule of inadmissibility of juvenile confessions upon the grounds (1) that they are "untrustworthy", and (2) that *Miranda* now requires warnings, and since such warnings cannot be "adequately comprehended by the vast majority of children", no valid waiver of constitutional rights may be obtained (Br. 42-47).

Despite the difficulty of assessing Petitioner's often jumbled claims, and demi-arguments, we believe that a fair reading of his entire argument under these headings makes clear two central themes. First, applying traditional principles of involuntariness case law, the confessions taken under *these* circumstances from *this* Petitioner were coerced. Second, that as a matter of constitutional dogma, and without reference to this Petitioner, confessions taken from juveniles are always inadmissible. So understanding Petitioner's arguments, we proceed to a consideration of their merits.

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5. Though neither the trial court, nor the Supreme Court of Illinois, for the reasons stated in the latter's opinion, credited this testimony. "So we put to one side the controverted evidence . . . [and take] only the undisputed testimony", *Haley v. Ohio*, 332 U.S. 596, 597-98 (1948) (opinion of Mr. Justice Douglas).

A.

Petitioner's Confessions Were Voluntary. They Were Not Coerced.

In essence, the circumstances surrounding the taking of Petitioner's oral and written confessions—as found by the trial court and the Supreme Court of Illinois from the *credited* evidence—are these.

Petitioner was taken into custody outside his classroom shortly after 8:00 A.M. on April 21, 1961 by officers Teller and Prunkl[2] who questioned him concerning the murder until approximately 8:45 A.M. when they turned him over to Sergeant Frank Follis of the youth division. No admissions of guilt were made during this 45 minute period.

Petitioner was in the custody of Sergeant Follis for approximately 15 minutes until he was turned over to the custody of officers Thomas and Perkins who then took him to the Audy (Juvenile) Home. No interrogation took place during this 15 minute period.

After arrival at the Audy Home, Petitioner's clothes were taken for laboratory examination. He was given other clothing to wear and placed in a room in the infirmary which contained a bed, mattress, table, stool, radiator, light fixture and window. Lunch was provided. Petitioner remained alone in this room from approximately 10:00 A.M. until 4:00 P.M. No interrogation took place during this 6 hour period.

At 4:00 P.M., Petitioner was taken to an interview room. Here, officers Thomas, Perkins, Keating and Killackey talked to him for 5 minutes. This time was spent introducing the officers to Petitioner and, after he denied complicity in the crime, revealing to him the results of certain

laboratory examinations which had been performed on the clothes worn by him at the time of arrest.

After the 5 minute period, officers Killackey and Keating left the room. Requested by officers Thomas and Perkins "to tell us about it and get it off his chest," Petitioner immediately told them that he had stabbed Mrs. Keane, but claimed that it was the result of an "accident".

After describing the "accident" in some detail, Petitioner was shown several photographs of the murder scene. Petitioner then pointed out items in the pictures which he had mentioned in his oral statement.

At 5:00 P.M., Petitioner was given a medical examination and taken to the Family Court Building next door to the Andy Horne. At 6:30 P.M., he was requestioned by Assistant State's Attorney (now Judge) Louis Garippo in the presence of a court reporter and Sergeant Keating. He repeated his previous confession. At 8:15 P.M., three typed copies of the confession were returned and Petitioner followed along while the confession was slowly read aloud to him. He then signed the confession, and initialed those places in it where he had pointed out mistakes which were then corrected.

In sum, therefore, Petitioner's first confession—an oral statement—was given after only five minutes of questioning. Prior to this 5 minute period, Petitioner had not been in the custody or presence of police officers for some 6 hours. And the 45 minutes of questioning which preceeded this 6 hour period produced no admission of guilt. Petitioner's second confession—a formal, typewritten statement—was given about 1½ hours after the oral statement, and, during this 1½ hour period, Petitioner was not questioned.

Putting aside, for the moment, the character of Petitioner and his particular responses to police custody and questioning, it may at once be seen that this case is neither *Haley* v. *Ohio*, 332 U.S. 596 (1948), an opinion upon which Petitioner so heavily relies, nor controlled by it. This is so for several reasons.

First, Haley, a 15 year old boy, was questioned for 5 consecutive hours, by relays of police, "through the dead of night", i.e., from about midnight until 5:00 A.M.

Second, a reading of the opinion of Mr. Justice Douglas[6] in that case makes clear that the police characterization of the atmosphere of this lengthy interrogation was simply not credited[7].

Third, the *holding* of the opinion is specifically bottomed upon five elements, three of which are not present in this case. Mr. Justice Douglas said:

> "[1] The age of petitioner, [2] the hours when he was grilled, [3] the duration of his quizzing, [4] the fact that he had no friend or counsel to advise him, [5] the callous attitude of the police towards his

6. There was no opinion for the Court in *Haley*.

7. ". . . he was kept incommunicado for over three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission. A photographer was admitted at once; but his closest friend—his mother—was not allowed to see him for over five days after his arrest. [These events] . . . . show such a callous attitude of the police towards the safeguards which respect for ordinary standards of human relationships compels that we take with a grain of salt their present apologia that the five hour grilling of this boy was conducted in a fair and dispassionate manner." 332 U.S. at 600.

> rights *combine* to convince us that this was a confession wrung from a child by means which the law should not sanction." (332 U.S. at 600-01) (emphasis added.)

Of these *five* elements, *all* of which the opinion characterizes as essential to the holding,[8] only *two* are present in this case. Haley was 15; Petitioner was 14. Neither had counsel.

The opinion's assessment of Haley's treatment by the police is easily drawn, where it is not precisely stated, from the phrases repeated again and again by its author: "the dead of night"; "relays of police"; "ready victim of the inquisition"; "overpowering presence of the law"; "questioned him hour after hour"; "disregard of the standards of decency"; "callous attitude of the police"; "behind closed doors in the dead of night"; "the hours when he was grilled"; "confession wrung from a child"; "methods which flout constitutional requirements"; "inquisitorial practices".

In all candor, Petitioner, were he not blinded by the hyperbolic character of his Brief describing the atmosphere surrounding the taking of the confessions in this case, should admit that such phrases cannot fairly be applied here. And even if he does not, this Court must so find. *Haley* v. *Ohio* does not apply.

Petitioner also relies upon the dissenting opinion of Mr. Justice Schaefer in *People* v. *Richardson*, 207 N.E. 2d 478 (Ill. 1965). Without examining the validity of the dissent's somewhat mechanical hypothesis that a defendant is entitled to a lawyer when the police employ a

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[8] Cf. *Escobedo* v. *Illinois*, 378 U.S. 478, 490-91 (1964) and *Frazier* v. *Cupp*, ——— U.S. ———, 5 Cr. L. Rep. 3041, 3043 (April 22, 1969).

lawyer to obtain a confession—the short answer is that the rule proposed there is premised explicitly upon a reading of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964)[9]. Hester's confessions were given on April 21, 1961. *Escobedo* does not apply to these confessions. *Johnson* v. *New Jersey*, 384 U.S. 719, 721, 733-34 (1966).

Haynes v. *Washington*, 373 U.S. 503 (1963) is also of little comfort to Petitioner. For *Haynes* is a coerced confession case in the classic sense.

In *Haynes*, the petitioner first orally confessed to a robbery some 30 minutes after the commission of the offense and while he was being transported to the police station. A short while later, he repeated an oral confession while being held at the station. The next morning, a third confession followed. This confession was transcribed and petitioner was taken to the prosecutor's office where he gave a fourth statement. He then signed the third statement but refused to sign the fourth.

Petitioner's first three statements, both oral and written, were admitted in evidence at his trial. This Court, after examining the record, found that the third, or signed, confession was coerced because prior to its making and signing, petitioner had not been allowed to call his wife and, in fact, was told that he could call his wife only after

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9. "In my opinion the joint statement that was taken in question and answer form by an assistant State's Attorney was inadmissible *under the decision of the Supreme Court of the United States in Escobedo* v. *Illinois*, 378 U.S. 478, whether the opinion in that case is read broadly or narrowly." *People* v. *Richardson*, 32 Ill. 2d 472, 477, 207 N.E. 2d 478, 481 (1965) (dissenting opinion of Mr. Justice Schaefer) (emphasis added). The Court will note that Mr. Justice Schaefer did not rely upon his *Richardson* formula in dissenting in this case.

the police had completed the interrogation process. The Court said:

> "Haynes contends that the confession was involuntary and thus constitutionally inadmissible, because induced by police threats and promises. * * * The uncontroverted portions of the record thus disclose that the petitioner's written confession was obtained in an atmosphere of substantial coercion and inducement created by statements and actions of state authorities. * * * Haynes' undisputed testimony as to the making and signing of the challenged confession used against him at trial permits no doubt that it was obtained under a totality of circumstances evidencing an involuntary written admission of guilt.
>
> * * * The petitioner at first resisted making a written statement and gave in only after consistent denials of his requests to call his wife, and the conditioning of such outside contact upon his accession to police demands. Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family, Haynes understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which made, that choice cannot be said to be the voluntary product of a free and unconstrained will, as required by the Fourteenth Amendment." 373 U.S. at 513-14.

There is no question that confessions which are the product of police threats or promises are involuntary. *Lynumn v. Illinois*, 372 U.S. 528 (1963). There is no question that the majority of this Court found, in *Haynes*, that his written confession was the product of police threats and promises. But there is no credited or unrebutted evidence in Hester's case to compel the conclusion that Petitioner's confessions, either oral or written, were the product of such police malfeasance.

Under the facts of *Haynes*, it was irrelevant that his oral confessions, admitted without objection, were not the product of coercion. For it has long been the rule, and we do not challenge it, that where a coerced confession infects the judgment of a state court, the conviction must be reversed without regard to whether there is sufficient other evidence, including valid and admissible confessions, to support the conviction. *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Haynes* v. *Washington*, 373 U.S. 503, 518 (1963). The judgment of conviction in *Haynes* was the product of both admissible and inadmissible confessions. The judgment of conviction in *Hester* rests upon two confessions, but both of these confessions were valid and admissible. *Haynes* v. *Washington* does not apply.

We come, then, to a consideration of Petitioner's mainstay—*Gallegos* v. *Colorado*, 370 U.S. 49 (1962). In *Gallegos*, the petitioner, a 14 year old boy, was taken into custody for the murder of an elderly man. He gave an oral confession to a police officer who, noticing him on the street because he fit the suspect's description, asked him to sit in the police car and then questioned him. Confessing immediately, petitioner was taken to the Juvenile Hall where he repeated his oral confession. The next evening, petitioner again confessed and the officer took notes of his confession, which were then signed by petitioner. Five days later, petitioner gave a formal confession which was transcribed and signed. All confessions—both oral and written—were admitted in evidence at the trial.

The Court's opinion in *Gallegos* is, at best, difficult to comprehend; and, in part, unsatisfactory. It can be, and has been, read at several levels. We shall treat all of them.

that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.

I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helpless while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society." *Watts* v. *Indiana*, 338 U.S. 49, 61-62 (1949). (concurring opinion.)

Criminal defendants, rich as well as poor, young as well as old, enjoy more protection from unjust conviction today than at any time in our history. "The terrible engine of the criminal law" (*Culombe* v. *Connecticut*, 367 U.S. 568, 581), has been repeatedly braked by this Court, by state courts and legislatures, and by fair and honest administration of the law by prosecutors and police. We need now to guard against its derailment.

II

THE PETITIONER'S GUILT WAS ESTABLISHED BEYOND ALL REASONABLE DOUBT BY COMPETENT EVIDENCE.

(Answer To Petitioner's Point I(d))

Despite the Petitioner's claim that the State's case "fell far short of proving [Hester] guilty" (Br. 53), what

he really tries to bootleg into the review of this case is a thinly veiled charge that the Petitioner's conviction is the result of some massive police-prosecution conspiracy. This is made eminently clear when one reads in the Petitioner's Brief that "It is beyond imagination to comprehend the lengths the prosecution went to secure the defendant's conviction." (Br. 53).

Now while the Petitioner is of course free to pursue whatever appellate strategy he wishes, he is also accountable for whatever resultant inconsistencies and illogical positions he causes to appear. Therefore, unless one were to conclude that one of the largest prosecution agencies in the country, supported by one of the largest police departments, is manned by utter fools, it stands to reason that it is most unlikely that they would go to any "lengths" to secure a conviction and yet fall "far short" of their goal. Simply put, it ill behooves the Petitioner to suggest a most contrived case while claiming insufficiency.

It does little for a review of the determination of guilt for Petitioner to suggest that the lipstick stain on his jacket is "ludicrous" (Br. 54), and that the analysis of such evidence should be labeled a "deceitful approach" (Br. 54); that the blood testimony is "unbelievable" (Br. 55), and that "a scientific hoax was . . . perpetrated" (Br. 61); to question whether produced evidence ever in fact existed ("If there was a hair") (Br. 61); to claim that the use of accepted scientific procedures, (bombardment of metal particles) is a "fantasy" (Br. 62), and to describe as "incredible" (Br. 64) the version of the murder as stated by the Petitioner in his confession.

The Respondent could counter in part the claim of a rush to judgment and conviction of an innocent youth, by stating that the then State's Attorney of Cook County presently sits as a Justice of the Supreme Court of Illinois, that the trial judge today serves as a Judge of the United States District Court, that the chief prosecutor subsequently became the State's Attorney and today is a Justice of the Appellate Court of Illinois, that the Assistant State's Attorney who took the statement from Hester is now an Associate Judge of the Circuit Court of Cook County and that the head of the Chicago Crime Laboratory was, in addition to being a police officer, an attorney and chemist. However, this is not the Respondent's answer to the Petitioner's broadside assault on the conviction. It is only mentioned for the purpose of maintaining some perspective when assessing the Petitioner's wholesale and unfounded allegations regarding the presentation of the State's case and the conduct at the trial.

The Petitioner stands condemned because of his own statements and conduct as a witness and because of the overwhelming circumstantial evidence presented by the State.

Specifically Petitioner attacks the sufficiency of the evidence on two grounds. First, he argues that the written confession was completely untrustworthy. Then he launches his blanket attack on the scientific evidence.

The circumstances surrounding Hester's oral and written statements, outlined above in the Statement of the Case and Argument, were non-coercive. Of equal importance in assessing the voluntariness and trustworthiness of the statements is the fact that when Hester took the stand and testified concerning the circumstances of his arrest and confession he proved himself an unmitigated liar.

Attempting to paint a portrait of coercion, he testified that he was questioned by numerous police officers outside his classroom at the time of arrest—eight or nine of them, he said (R. 458). Caught up with the force of his own narrative he made the mistake of identifying in court an Assistant State's Attorney as being one of the police officers who participated in his alleged inquisition. (R. 457). In fact, there were only the two arresting officers outside the schoolroom. Neither they nor any school teacher saw other policemen in the hall at the time. There were none. (R. 621, 639, 680, 686, 690-91, 2830, 2845).

Petitioner told several useless lies, which could in no way have aided his defense, when he first denied signing the confession or placing his initials on the pages (R. 507), a foolish tactic for one who later conceded the genuineness of the documents (R. 585-586).

Hester testified that Sgt. Killackey spat in his face at the police station (R. 608-9). But on cross-examination he was forced to concede that that wasn't true (R. 612).

The retreat of Hester's credibility became a rout when he testified that Officer Pruneckle kicked him in the left leg at the time they first met outside Hester's classroom (R. 453). As the trial judge stated in his findings of fact, it is "just inconceivable" that an officer would walk up to Hester in the hallway of the school and proceed to kick him in the shin the moment they met. All other persons present denied that this occurred, including three school teachers who were present (R. 639, 679-80, 687, 691). Significantly, Hester was to report this alleged incident to no one including the doctor he encountered at the Audy Home (R. 2392). This tawdry episode con-

cluded when the State introduced a newspaper photograph of Hester with his right, not his left, pants leg pulled up displaying the injured limb to his attorney (R. 2396-97, 2968).

Hester testified that he was placed in a "dungeon" at the Juvenile Home. That description paled when it was revealed that the "dungeon" was a clean, lit, furnished room in the Home's infirmary (R. 2884-85).

Testimonial conflicts of this kind only serve to enhance Respondent's argument that Hester's confession was voluntary. They unquestionably weighed in the minds of both the trial court and jury who chose not to believe Hester.

Petitioner strongly intimates that his statements were dictated to him by the police. He argues, for example, that the language of the written statement is inconsistent with his manner of speech; that he would never say he went to the bookroom at "two minutes to ten." Allegedly, Hester was too deficient "in education and sophistication" to use such language. However one of the first phrases out of his mouth on direct examination was that he went to school at "three minutes before eight" (R. 447-448). He said that his class took a toilet recess at "ten minutes before ten" (R. 2341) and that he was sent home at "3 or 4 minutes before twelve (R. 2346). The fact is that Hester does talk this way and this use of the language in his written statement does not indicate that words were put in his mouth.

Defense counsel argued at trial that Hester was a very dependent individual, afraid of older and larger males, abnormally afraid of physical injury and extremely gullible. Significantly, Hester's school records, which defense counsel introduced into evidence and insisted on reading

to the jury, showed that Hester was openly defiant to his male and female superiors at school (R. 2259). The school records also indicate that Hester had been encouraged by his parents to fight back if picked on, and he did just that (R. 2256-57). Hester was aggressive. (R. 2254). His demeanor on the witness stand displayed the same defiant attitude his teachers had come to know:

> Q. (By Mr. Stamos): Was your underwear in the picture when you looked at it?
>
> A. You got a picture. You look at the picture and find out. (R. 602; see also R. 597-598)

Indeed, Hester kept referring to the 6 foot, 225 pound Detective Pruneke as the "little one," and the "little one who kicked me." (R. 435-55). This is quite surprising in light of counsel's attempt to picture the Petitioner as a small boy who fears large men. For an individual that the defense claims is retarded, Hester displayed a remarkably retentive memory and a keen eye for detail (R. 451, 460, 468, 569, 470, 475).

The essential contention that the statements were police constructs which Petitioner was forced to recite is incredible. Surely the police could have done better by forcing Hester to say something other than "it was an accident." Surely if the police had dictated Hester's statement, there would be no inconsistencies at all between the statement and the known facts. Surely if the police were willing to fabricate they would have lied about warning Hester of his constitutional rights.

It is rather obvious that the murder of Mrs. Keane probably did not take place in the way that Hester described it. It was most certainly not an "accident," as he first stated. The ridiculous story of falling over books with a knife magically appearing in his hand was undoubtedly

disregarded by judge and jury. This was a patent attempt by Hester to exculpate himself. Likewise, Hester admitted lying on top of Mrs. Keane, but denied sexual penetration in a further attempt to exculpate himself.

It is common knowledge that a person who chooses to confess to a crime will often use the occasion to brighten his image to the extent that is possible. Indeed the extent to which this was done is an indication of the voluntariness of and lack of suggestion in Hester's statements. Hester admitted his presence at the scene of the crime when confronted with the physical evidence, and he admitted the act. Since he chose to deny culpability the burden fell upon him to tell a reasonable story or be judged by its improbabilities. A jury may accept all, parts, or none of a confession. Hester's statement was largely corroborated by the facts. The method of killing (multiple stab wounds), the fact that Mrs. Keane was killed in the bookroom, the contents of the bookroom, the fact that the bookroom door was locked (it does not lock automatically) and the sexual aspects of the crime are all corroborative of Hester's admissions.

Petitioner further contends that the physical evidence did not support the guilty verdict.

There is no question that technician Principe, who typed the bloodstains at the Chicago Crime Laboratory, and Dr. Weiner, the defense blood expert who ran no tests of his own, were not in complete agreement. The jury evidently did not accept Dr. Weiner's conclusions, possibly because they were dubious about his objectivity. The doctor admitted writing a letter to defense counsel in which he coached counsel to "harp on" Principe's failure to determine sub-groups; while on the stand he admitted that he could not expect Principe to determine the sub-groups from the stain (R. 2713-2720).

The jury may have been doubtful because Dr. Weiner admitted that he did not know how much blood Principe had for his test and they may have looked askance at his less than subtle efforts to endorse himself as fair and impartial.

What is incredible here is that Petitioner's counsel argues that the stain was of blood type O while their own expert could only say that the result was inconclusive[28]. Dr. Weiner was of the opinion that the test had simply been conducted improperly and that the stain could have been any type, including A, which was Principe's conclusion. (R. 2656-2657). Certainly the doctor's testimony, consisting of answers to hypothetical questions, does not support the novel theory of counsel nor would it place the jury under compulsion to reject the findings of Principe.

In regard to the other physical evidence presented by the State, Petitioner offers nothing in rebuttal save the comments and opinions of counsel. For example, it was scientifically proven that the metal particles found in the Petitioner's pockets were identical to those found in the waistband of the victim's panties. The particles had exactly the same refractive index and solubility. They were all from the same source which contained a free silver base covered by a protective plastic coating, such composition indicating jewelry. The Illinois Supreme Court found:

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28. In the Supreme Court of Illinois they argued with equal vigor that Principe should have found type AB. That assertion has been abandoned in favor of the present one because if the stains were AB, Hester's explanation of the presence of bloodstains was perjurious and the axe handle on which he allegedly splintered himself was a phony exhibit, since Hester's blood type is O.

> "The defense argument that there was no way such a particle from the defendant's pocket could have come to be imbedded in the back of the deceased's waistband is exceedingly questionable in a case involving a forcible rape, particularly since defendant's statement indicates the decedent 'rolled' over." 237 N.E. 2d at 482.

The lipstick stain on the Petitioner's jacket and the victim's lipstick, found in her purse, were subjected to ultraviolet inspection and found to be similar in color, reflection, and fluorescence. Similarly, when a gray hair from the victim's head was compared to the hair found on Petitioner's jacket both were determined to be caucasoid in origin, devoid of pigment, containing the same density, refractive indices and medullary structure. In light of Technician Hazen's testimony that it was very, very remote that both hairs tested could have different origins, it is impossible to regard seriously counsel's unsupported assertions that the hair could have come from "anywhere."

Understandably the position can be taken that no one item of scientific evidence or any other individual piece evidence is generally overwhelming in and of itself, yet when one considers the cumulative effect of all the evidence in this case the only certain conclusion is that the guilt of the Petitioner was proved beyond all reasonable doubt. Noteworthy in this connection are the observations of the Supreme Court of Illinois in reviewing the State's case at trial. Commenting specifically on the scientific evidence the court stated:

> "The scientific evidence presented by [the State] aside from the testimony regarding blood identification was impressive and without substantial contradiction." 237 N.E. 2d at 482.

The Court concluded:

> "In our opinion the evidence, when viewed as a whole, provides an ample basis for the jury verdict." 237 N.E. 2d at 483.

And the dissenting opinion of Mr. Justice Shaefer never even suggests the possibility that the evidence was insufficient.

Thus when the supporting testimony of witnesses who saw Hester leave his room; the testimony of the witness placing Hester in possession of a knife; and the statements of the Petitioner admitting the stabbing and sexual abuse of Mrs. Keane are combined with the scientific proof, it is manifest that the verdict was supported by overwhelming and competent evidence.

III.

THE QUESTIONS OF WHETHER DEFENDANT'S POST-ARREST CUSTODY VIOLATED THE McNABB-MALLORY RULE, AND WHETHER THAT RULE APPLIES TO THE STATES, ARE NOT BEFORE THIS COURT.

(Answer To Petitioner's Point I(c))

Petitioner argues that his post-arrest custody was in violation of the constitution because he was not promptly taken before a magistrate for a preliminary hearing (Br. 48-52). The consequence of this supposed violation is said to be the suppression of his confessions. This claim is based upon the premise that the federal rule of procedure set forth in *McNabb* v. *United States*, 318 U.S. 332 (1943) and *Mallory* v. *United States*, 354 U.S. 449 (1957) is now binding upon the states through the due process clause.

This point was never raised or passed upon in the trial court and was never raised or passed upon by the Supreme Court of Illinois on appeal. It appeared for the first time in this case when it was smuggled into the Petition for Certiorari. Under these circumstances, the Court is without jurisdiction to consider this question and it should not do so. *Cardinale* v. *Louisiana*, —— U.S. ——, 5 Cr. L. Rep. 3005 (April 1, 1969). Accordingly, as to this point, the writ of certiorari should be dismissed for want of jurisdiction.

IV.

PROFFERED TESTIMONY OF THE DEFENSE PSYCHIATRIST WAS CLEARLY INCOMPETENT AND WAS PROPERLY REFUSED BY THE TRIAL COURT.

(Answer to Petitioner's Point III(a))

The Petitioner claims a denial of a fair trial on due process grounds alleging he was prevented from establishing that a psychologically coerced confession existed in this case. Arguing that he was precluded from questioning his psychiatrist on the susceptibility of Hester to psychological and mental coercion, the Petitioner cites *Blackburn* v. *Alabama*, 361 U.S. 199 (1960) and *Culombe* v. *Connecticut*, 367 U.S. 568 (1961).

Aside from the fact that Petitioner has never been able to establish any conditions precedent to a psychologically coerced confession, and before proceeding to the issue of whether the defense psychiatrist was qualified to testify, it must be noted that the above cases from which the Petitioner attempts to draw support are so far factually removed from the instant cause that reference to them is meaningless.

In *Blackburn* this Court found that the accused was questioned for eight or nine consecutive hours and moreover concluded that "the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed." 361 U.S. at 207. In *Culombe*, another case totally unlike this case, the accused "was detained in the effective custody of the police for four nights and a substantial portion of five days before he confessed" and was found to be a "mental defective of the moron class" and "wholly illiterate." 367 U.S. at 620, 625.

The record of this case not only defies comparison with *Blackburn* and *Culombe*, but instead invites the conclusion that the Petitioner, both by his trial demeanor and testimony, as well as his limited exposure to police questioning, was far from the psychologically susceptible subject this Court has previously found victim of coercion.

The Petitioner's entire argument with reference to the offered testimony of Dr. Marvin Ziporyn, a psychiatrist hired by the defense to testify on petitioner's behalf, presupposes that Ziporyn was in a position to give competent testimony. In fact, he was not. An examination of the record (not undertaken in Petitioner's Brief for reasons which shall become obvious) discloses a most unsavory relationship between Ziporyn and this case.

On July 6, 1961, some 2 months after the murder of Mrs. Keane, defense counsel requested the trial court to allow Dr. Ziporyn to draw blood from the Petitioner:

> "The Court: Whatever medical attention you want him to have
>
> Mr. Feldmann: It's not even for medical attention, Judge.
>
> Mr. Kaplan: I think we have a right to take his blood, your Honor." (R. 103).

When the motion was heard, counsel for Petitioner stated "we want to extract his blood" (R. 102). The State asked to be present (R. 105). Defense counsel objected stating, "Our word must mean something to the court." (R. 105). The court allowed the defense motion. Later the same day defense counsel informed Warden Johnson of the Cook County Jail that they wanted to make a physical examination and draw blood (R. 133). Defense counsel and Ziporyn were then allowed to examine the petitioner in the presence of County Jail Nurse Goodloe. When Ziporyn attempted to enter a room with Hester and close the door, Nurse Goodloe protested, whereupon defense counsel spoke to Warden Johnson over the phone. Counsel then told Nurse Goodloe that the Warden said it was all right for Ziporyn to be alone with Hester (R. 142). Warden Johnson specifically denied giving any such permission (R. 146).

Ziporyn's interview ended abruptly. While alone with Hester, Ziporyn injected him with 7½ grains of sodium amytal in violation of jail rules (R. 134). Hester lapsed into a catatonic state, was unable to walk and had to be placed in protective restraints. (R. 141-142). No blood sample was taken. Thereafter the court censured defense counsel for deliberately misleading the court (R. 149).

Ziporyn indicated that he took no notes during his examination (R. 123). He testified that he would require several more interviews before he could arrive at a conclusion as to Hester's mental condition (R. 124). Yet Ziporyn only interviewed Hester on one other occasion (C. L. Rec. 76).[29]

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29. This situation should be contrasted with the facts of *In the Matter of W. and S.*, 19 N.Y. 2d 55, 224 N.E. 2d 102, cited and quoted by the Petitioner (Br.

Hester's dealings with Ziporyn represent the worst sort of marriage between law and psychiatry. When Judge Canel ordered a Behavior Clinic Examination to determine if Hester was competent to sign a change of venue petition, defense counsel objected (R. 19-22), and it is undisputed that Hester did not cooperate with the Behavior Clinic. Yet when the defense sought to use psychiatrists for their own purposes Hester was apparently cooperative. Furthermore, the Petitioner sought to use the nonprobative and incredible technique of proving his innocence by asking of Ziporyn whether the murderer had to be a psychotic and then asking if the defendant was sane, hoping to receive answers of yes. The defense did elicit an opinion that Hester was legally sane (R. 2321), but was precluded from eliciting an opinion as to the personality of the murderer. Nevertheless, within the presence and hearing of the jury, defense counsel stated: "The crime was committed by a psychotic" (R. 2323).

Based solely on the irregularities arising out of Ziporyn's association with the case and the dubious value of an opinion based on what Ziporyn previously stated were less than the required number of interviews, the court was justified in restricting his testimony.[30]

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82) where the Court of Appeals of New York, in relying upon the testimony of a psychiatrist at a Family Court proceeding observed that the physician "had *many* conversations with Gregory and . . . formed a diagnosis that Gregory was a schizophrenic." 224 N.E. 2d 102, 105 (emphasis added).

30. It would appear that unorthodox relationships with criminal cases are not unique where Dr. Marvin C. Ziporyn is concerned. From September, 1965 to March, 1967 Ziporyn was employed by the County of Cook to be a psy-

Furthermore, there were sound legal reasons why the trial judge was, in fact, compelled to restrict Ziporyn's testimony.

First, any portion of Ziporyn's testimony which might have been based upon what Hester may have said under the influence of sodium amytal would be as inadmissible as the results of a lie detector test. Such testimony is excluded from evidence because of scientific disagreement as to the effect and accuracy of so-called truth serums. *People* v. *Jones*, 52 Cal. 2d 636, 343 P. 2d 577 (1959); *State* v. *Cypher*, 92 Idaho 159, 438 P. 2d 904 (1968); *State* v. *Lindemath*, 56 N.M. 257, 243 P. 2d 325 (1952). In *State* v. *Hudson*, 289 S.W. 920 (Mo. 1926), it was held that what a defendant told his psychiatrist while under the influence of a truth serum was inadmissible because it constituted a self-serving declaration and was rank hearsay. In accord: *People* v. *McNichol*, 100 Cal. App. 2d 554, 224 P. 2d 21 (1950).

Lindsay v. *United States*, 237 F. 2d 893 (9th Cir. 1956), presents a situation where the prosecution's use of sodium pentothal-induced statements resulted in reversal. The Court of Appeals held that it was error to admit a tape recording of a sodium penothal interview between a psychiatrist and the chief prosecution witness, even as a prior consistent statement for the limited purpose of rehabilitating the impeached witness. The court based its opinion

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chiatrist at the County Jail. Acting in that capacity, Ziporyn conducted interviews with mass-killer Richard Speck commencing in July, 1966. While the case was still pending in the state court Ziporyn contacted a publishing firm and agreed to disclose the confidential information elicted from Speck in the form of a book entitled "BORN TO RAISE HELL," Grove Press, 1967, $5.95. He was, of course, summarily fired.

on the fact that courts have not generally recognized the trustworthiness and reliability of "truth serum" tests as being sufficiently well established to accord the results the status of competent evidence, stating that "the expected effect of the drug is to dispel inhibitions so that the subject will talk freely, but it seems scientific tests reveal that people thus prompted to speak freely do not always tell the truth." 237 F. 2d at 896. As made clear in *Knight* v. *State*, 97 So. 2d 115 (Fla. 1957), there is no scientifically recognized drug that inevitably causes its subject to speak the truth. The so-called truth serums, including hyoscine, hydrobromide, sodium amytal, evipan sodium, nembutal, scopalomine, and sodium pentothal, are drugs that alter the consciousness so that the subject's ability to associate thoughts and inhibit his form of expression is impaired; none of these drugs assure truth. See also: *Commonwealth* v. *Butler*, 213 Pa. Super. 388, 247 A. 2d 794 (1968); Dession, Freedman, Donnelly, and Redlich, "*Drug-Induced Revelation and Criminal Investigation*," 62 Yale L. J. 315, 319 (1953).

Second, the trial court properly limited Ziporyn to statements of objective fact because he was not a treating physician, having examined Hester only that he might take the stand as an "expert" witness for the defense. The principle is well established that a doctor called for the purpose of examining with an eye toward testifying and not for treating cannot testify to subjective symptoms. With a treating physician a patient will not prevaricate because successful treatment depends on the truth. Such is not the case with a doctor who examines only to testify. It is common knowledge—and a matter of no small concern in the medical profession—that parties to litigation have attempted to use medical experts as trump cards. It

is, in part, for this reason that a non-treating physician is limited to objective testimony only.

Of course, Ziporyn was not a treating physician. The defense attorneys stated as much when they requested permission to have him see Hester (R. 103). Rather, he was a physician retained for the Petitioner after indictment ostensibly to take a blood sample, but whose true purpose was to administer a drug of doubtful efficacy in an effort to create defense evidence.

In *Padgett* v. *Southern Ry. Co.*, 396 F. 2d 303 (6th Cir. 1968), the Court of Appeals held that statements made to a physician to qualify him to testify as an expert witness are inadmissible. This rule of evidence is based on the familiar hearsay doctrine and is designed to exclude self-serving declarations disguised as expert testimony. The same rule has been applied in a long line of Illinois cases[31].

Lastly, defense counsel argued at trial that the testimony of Ziporyn would prove Hester to be a very dependant individual, afraid of older and larger males, abnormally afraid of physical injury, and extremely gullible.[32] The Court properly limited Ziporyn's testimony because defense counsel persistently sought to elicit it by improper questions. It is obvious from the offer of proof that Zip-

31. See *Santiemo* v. *Days Transfer Co.*, 9 Ill. App. 2d 487, 133 N.E. 2d 539 (1956); *Brennan* v. *Leshun*, 51 Ill. App. 2d 132, 201 N.E. 2d 167 (1964); *Conway* v. *Tambrini*, 68 Ill. App. 2d 190, 215 N.E. 2d 303 (1966); *Louisiana & Arkansas Ry. Co.* v. *Johnson*, 214 F. 2d 290 (5th Cir. 1954); *Nashville, Chattanooga and St. Louis Ry. Co.* v. *York*, 127 F. 2d 606 (6th Cir. 1942); *Hardy-Burlington Mining Co.* v. *Baker*, 10 F. 2d 277 (6th Cir. 1926); *Walker* v. *West Coast Fast Freight, Inc.*, 233 F. 2d 939 (9th Cir. 1956).

32. Significantly, none of this testimony was offered on the motion to suppress Hester's confession.

oryn would have to base his opinion on facts of which he could have no personal knowledge, i.e., family relationships, family teachings, and alleged specific threats or pressures on Hester when he made his statements (R. 2324-5). The only way to properly include facts outside the personal knowledge of the expert is by asking him a hypothetical question including those facts. Such a question must be based on facts established or supported by evidence presented prior to the asking of the question. *Harten* v. *Laflen*, 212 U.S. 397; 29 S. Ct. 351 (1908); *Grand Island Grain Co.* v. *Roush Mobile Home Sales, Inc.*, 391 F. 2d 35 (8th Cir. 1968); *Soloman Dehydrating Co.* v. *Guyton*, 294 F. 2d 439 (8th Cir. 1961). Illinois cases in point apply the same rule. See, for example, *People* v. *Muniz*, 31 Ill. 2d 130, 198 N.E. 2d 855 (1964).

In this case no facts about Hester's family background, particularly any relations with his father or older brothers, were ever brought out. And no allegations of coercive pressure were made until after Ziporyn left the stand. Finally, no attempt was ever made to ask a hypothetical question.

The instant case falls squarely within the rationale of the cases cited. The trial court realized that Ziporyn examined Hester only for the purpose of giving subjective testimony and that his diagnosis might be affected by Hester's self-serving statements. Therefore, Ziporyn was properly limited to a statement of objective facts. His opinion was based, in part, upon information given to him by Hester (R. 2314). Such a personal history clearly constitutes the most subjective type of analysis. The questions

proffered here by the defense were not limited to observable objective symptoms, but were claimed to be based on a whole examination of the petitioner, and that such an "examination consisted of a mental status examination and a complete psychiatric history" (R. 2314). This history was hearsay and inadmissible. *People* v. *Brown*, 31 Ill. 2d 415, 201 N.E. 2d 409 (1964). Clearly then, the trial judge was correct in refusing to allow Ziporyn to testify to the matters cited in the offer of proof.

V.

THE SCOPE OF DISCOVERY ACCORDED DEFENSE COUNSEL ENCOMPASSED ALL MATERIALS WHICH WERE RELEVANT TO THE PETITIONER'S CASE AND WAS SUBSTANTIALLY BROADER THAN THAT REQUIRED BY LAW.

(Answer to Petitioner's III(b))

The record reveals that counsel were provided with the prior statements of all witnesses called by the state as well as a complete list of witnesses. In addition they had interviewed countless adult witnesses on their own prior to arraignment (R. 3), and had thereafter interviewed many school children (R. 47). Copies of the autopsy protocol as well as the results of all tests conducted by the Chicago Crime Laboratory were provided and counsel were permitted to take experts to the laboratory on two occasions (R. 65) where they were allowed to independently examine the physical evidence and run their own tests, using the laboratory's facilities (R. 2517-18). On one occasion their expert spent four hours with Captain Dragel, head of the section, at the laboratory. (R. 67). Defense counsel appeared at the laboratory twice (R. 167). It further ap-

pears that at the time counsel made their motion to have Doctors Wiener and Campbell (R. 234) admitted to the Crime Laboratory, one Dr. Davis and his associates had made three prior examinations on behalf of petitioner (R. 231). Significantly, the results of Dr. Davis' tests were never offered in evidence by the defense nor was he called to testify.

A copy of Hester's written confession was given to counsel as were the complete records of the Chicago Board of Education regarding Hester and his victim, Mrs. Keane. In this connection it should be noted that counsel abused their subpoena power on several occasions. They demanded records that did not exist (R. 223, 225-26), resubpoenaed the same records of Hester and Mrs. Keane because, in counsel's opinion, the files were "quite thin" (R. 252), and, on one occasion, caused subpoenas to issue at 3:30 in the afternoon for records which were to be due in court the following morning (R. 184-187). On another occasion, counsel waited until the Board attorney left the courtroom before demanding further Board records (R. 189, 213).

It should also be noted that counsel made no demand for police reports or notes at the appropriate time, that is, when the State witnesses were called to testify. They now allege that error of constitutional dimension infected Hester's trial because of limitations on discovery.

The State of Illinois, displaying a progressive attitude in matters of discovery, has, by case law, adopted the rule of the Jencks Act, 18 U.S.C. 3500, and has provided that in criminal cases the defense is entitled to "statements or reports which could properly be called in the witnesses own words." *People* v. *Wolff*, 19 Ill. 2d 318, 323, 167 N.E. 2d 197, 201 (1960). Illinois has taken this position on its own initiative even though in *United States* v.

Augenblick, 393 U.S. 348 (1969), this Court held that "our *Jencks* decision and the Jencks Act were not cast in constitutional terms . . . . They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials." 393 U.S. at 356. Following the *Wolff* decision, a criminal defendant in Illinois enjoys a greater latitude of discovery than defendants in many other states. Petitioner Hester was accorded the full privileges of *Wolff* and more.

The Crime Laboratory personnel ran certain tests, and as they did so they made notes and jottings as to time and temperature. This was done for their own benefit so that when the tests were run a second or third time, for purposes of verification, the results could be checked against the first results. This is standard practice in any scientific laboratory. The notes might consist only of a few numbers scribbled on a piece of paper which would be totally meaningless to anyone but the writer. Petitioner contends that the failure to produce these notes was error.

In fact, the provision of laboratory notes, in the only instance in which they were requested, would have been quite irrelevant to the Petitioner's case. Dr. Wiener testified for the defense that, in his opinion, technician Principe had run his typing tests all wrong and that his conclusions were of no value. Therefore, technician Principe's notes, which might have indicated exact rather than approximate clumping times, would be thoroughly useless to counsel because the whole thrust of their argument was that the test and clumping times were meaningless in any event.

The State complied precisely with the rules of criminal discovery which prevail both in Illinois and the Fed-

eral Courts. In fact, they went beyond that in an effort to help the defense fairly compile information, giving defense counsel and their various experts virtual free-run of the Crime Laboratory. Furthermore the record fails to demonstrate how the defense might have been prejudiced by the failure to produce certain scientific jottings which the prosecution never had in its possession in any case (R. 3-4). There is absolutely no intimation that these notations were contradictory to the testimony of the laboratory technicians concerning their findings; and such numerical notations cannot correctly be characterized under the Jencks Rule, adopted in *Wolff*, as a "written statement" which has been defined as "a recorded recital of past occurrences made by prospective prosecution witness." *United States* v. *Sopher*, 362 F. 2d 523, 525 (7th Cir. 1966). The notes made by Crime Laboratory technicians were not statements or reports in any sense of the word. They were not turned over to any higher police authority for purposes of review as a departmental report. Nor were they communications to the prosecution. They were at most merely the personal notes and jottings of a scientist.

The rule is widely accepted that notes accumulated and used in preparation of official reports need not be preserved and turned over to defense counsel. The argument advanced by Petitioner here was made in *People* v. *Dickerson*, 270 Cal. App. 382, 75 Cal. Rptr. 828 (1969), and rejected:

> "To support such a contention and defense must mean that in connection with any investigation of an alleged crime everybody carrying on such an investigation must preserve rough notes made for the purpose of ensuring accuracy of their official reports and deliver them upon request to defense counsel in order to give possible grounds for cross-examination of such

witnesses; no such rule has ever been propounded; it seems to us that it seeks to carry to a ridiculous extreme the enunciation of 'rights of accused criminals'." 75 Cal. Rptr. at 833.

See also: *People* v. *Gorka*, 381 Mich. 515, 164 N.W. 2d 30 (1969); *State* v. *Jacobs*, 450 P. 2d 542 (Ore. 1969).

This Court has recently rejected the contention that the prosecution's failure to produce the "rough pencil notes" of its investigator violated a petitioner's constitutional rights. *United States* v. *Augenblick*, 393 U.S. 348 (1969).

In the instant case the defense had the results of the Crime Laboratory tests and the Laboratory reports. The tests were repeated by their own experts, the results of which were never produced at trial to rebut the State's evidence. Counsel cross-examined the State's scientific witnesses at great length, going through the tests step-by-step. Therefore counsel knew everything about the tests. In fact, they conceded their knowledge of the tests early in the litigation; the depth of the defense's claimed need for a perusal of any possible notations is reflected in their comment that all they wanted "to see was to see it in writing" (R. 73).

The Petitioner's random insertions of cases such as *Miller* v. *Pate*, 386 U.S. 1 (1967); *Giles* v. *Maryland*, 386 U.S. 66 (1967); *Brady* v. *Maryland*, 373 U.S. 83 (1962); *Barbee* v. *Warden*, 331 F. 2d 842 (4th Cir. 1964) are little more than undisguised attempts to cast an ominous overtone to a trial which in no way can be characterized as possessing analogous discovery situations. What is strikingly unfair about this tactic is that counsel for Petitioner in this Court constituted two-thirds of the defense team at trial and is intimately familiar with the latitude allowed regarding discovery below. No comment from the Re-

spondent could carry the weight of the words of defense counsel below when it was stated in connection with the facilities and personnel of the Chicago Crime Laboratory: ". . . everyone was completely cooperative" (R. 67).

The record clearly reveals no error whatever where discovery matters are concerned.

VI.

THE SEIZURE OF PETITIONER'S CLOTHING DID NOT VIOLATE THE FOURTH AMENDMENT BECAUSE IT WAS INCIDENT TO A LAWFUL CUSTODY WHICH FOLLOWED AN ARREST ON PROBABLE CAUSE.

(Answer to Petitioner's Point IV)

Following the arrest of Petitioner, he was brought to the Andy Home where his clothing was taken by the police so that it could be subjected to analysis at the Chicago Police Department Crime Laboratory. Petitioner claims that the seizure of his clothing was unlawful and that evidence derived from the laboratory analysis should therefore have been suppressed. (Br. 88-102).

Petitioner's argument is supported by the following reasoning: the arrest of Hester was unlawful since it was not based upon probable cause; or, even assuming the validity of arrest, since Hester's clothing was not taken until after he arrived at the Andy Home the seizure "was too remote in time and place to have been made incidental to the arrest" (Br. 98).

Our analysis of the issues presented, and their proper determination, runs along somewhat different lines. We

believe that the police had probable cause for the arrest of Hester; the arrest and subsequent custody were therefore valid, and since the clothing was seized incident to a valid custody, and not incident to arrest, questions of "remoteness" do not arise. We turn, then, to a consideration of these problems.

The first question to be decided is whether Hester's arrest, which occurred at approximately 8:45 A.M. on April 21, 1961, following the initial conversations between Petitioner and Officers Teller and Pruneke, was valid. Specifically, was Petitioner's arrest supported by probable cause?

The standard by which probable cause is determined has been stated many times by this Court, and we take as our starting point this Court's oft' repeated words from *Brinegar* v. *United States*, 338 U.S. 160 (1949):

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."***
>
> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise

> that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." 338 U.S. at 175-76.

But such a standard, taken with others from which this Court has woven and rewoven the fabric of the rule of probable cause, are *only* starting points. Like a determination of "voluntariness," a determination of "probable cause" can be made only by drawing together all that is shown concerning the relationship of a particular person to a particular crime, and then judging whether it holds the balance between suspicion on the one hand, and certainty of guilt on the other. What, then, did officers Teller and Prunkle know about Lee Arthur Hester and the murder of Mrs. Keane before his arrest on the morning of April 21, 1961?

The two detectives arrived at the Lewis-Champlain schools early in the morning on the day after Mrs. Keane's murder. After searching the premises they began to interview teachers. One teacher, Miss Virginia Fritsch, informed them that sometime between 8:00 and 11:55 a.m. on the morning of the murder she observed a student alone and running in the hall. This was unusual because students didn't ordinarily move about the building unaccompanied during school hours. The student was Lee Arthur Hester (R. 1082-1085). Miss Fritsch told the detectives that Hester was supposed to have been involved in some disciplinary matter; but because she had no personal knowledge in that regard she sent them to the Assistant Principal's office for further information (R. 1086). There they encountered Miss Rita Considine who informed them that "*Mrs. Keane told the other two clerks and myself going home*

in the car, that a parent had come up to complain about Lee Arthur wanting her boy to commit an unnatural act" (R. 1080). This incident was being treated as a disciplinary matter by school authorities and *Mrs. Keane* was handling it (R. 1086).

After hearing all this the detectives decided to speak with Hester. They proceeded to his classroom and, upon meeting him, noticed almost immediately that there were bloodstains on his clothing.[33] The officers asked him how he got the stains and Hester gave them the following assorted and evasive answers: that he got them in a fight with another boy; that he had a nosebleed; that he cut himself with an axe while chopping wood; that he was sawing wood and cut himself with a saw (R. 1126).

In the face of these facts, Petitioner's astounding and reckless assertions of malfeasance and incompetence on the part of Teller and Pruneke defy all understanding. He says:

> "The facts surrounding Hester's arrest show that Teller and Pruneke shockingly failed to engage in even a cursory investigation and literally arrested the first student with whom they came into contact" (Br. 89).
>
> "In substance, Hester was arrested because of a couple of scratches and small stains on his clothing, a condition prominent on most of the students at Lewis-Champlain school.[34] The arrest standards employed

33. In the Supreme Court of Illinois, Petitioner argued that the stains were so small the officers couldn't have seen them. This was completely absurd inasmuch as Hester himself testified that the officers asked him where the bloodstains came from (R. 455).

34. Of course, no record support for this assertion is cited and none exists.

by Teller and Pruneckle required that almost every student be arrested in the fashion of Hester" (Br. 92).

"Hester's name was mentioned . . . an inquisitorial flame was lit and the officers literally 'grabbed' the first 'guy' whose name was mentioned in an uncomplimentary manner" (Br. 92).

We do not understand how such arguments can be made. We certainly know that they cannot be supported. Before the arrest of Petitioner, the officers knew that (1) Hester had been seen alone in the hall on the morning of the murder, an unusual event according to school personnel; (2) Hester was then involved in a disciplinary matter concerning sexual misconduct; (3) this disciplinary matter was being handled by the murder victim, Mrs. Keane; (4) the day following the murder Hester had bloodstains on his clothing; (5) Hester's answers concerning the bloodstains and their origin were patently evasive.

Were these "facts leading sensibly to [the officers'] conclusions of probability," in the words of *Brinegar*? We believe that they were. Possessed of this knowledge, officers Teller and Pruneckle would have been derelict in their duty had they not arrested Petitioner for the murder of Mrs. Keane. Of course, this proof was not proof of guilt. But proof of guilt was not required. Most certainly, such evidence aroused much more than suspicion. From such evidence, officers Teller and Pruneckle could, and did, conclude that it was *probable* that Petitioner was involved in the death of Mrs. Keane.[35]

35. The answer to Petitioner's claim that probable cause was lacking in this case because of alleged "contradictions" in the testimony of the arresting officers (Br. 94-97) is found in the recent words of the United States

Petitioner argues, however, that the information obtained by the arresting officers should not have been *credited* by them because it rests upon "gossip" (Br. 91), and hearsay which was "unreliable and groundless on its face" (Br. 92). Support for this argument is then sought from decisions which deal with the issue of whether information received from unknown or "confidential" informants, principally in narcotics cases, was shown to have been "reliable."

The difficulty with this argument is that Petitioner has employed the wrong test, and, accordingly, he has reached the wrong result. The information supplied to the officers in this case—which goes much of the way to establishing probable cause—did not come from nameless, faceless accusers whose identities, motives and opportunities for knowledge are cloaked in the garb of the "confidential reliable informant." Rather, the officers here had the word of Hester's teachers and school administrators. Their identities were known; their motives were unquestionable and their opportunities to know were patent. In such a case, the usual rules requiring the verification of information supplied by persons who have not previ-

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Court of Appeals for the District of Columbia in *Pandergrast* v. *United States*, —— F. 2d ——, 4 Cr. L. Rep. 2378 (Jan. 31, 1969), where the court said:

> "The indicia of guilt need not be absolute, or even fully consistent; they may leave some room for doubt, and even for error. But they suffice, we repeat, when they 'warrant a man of reasonable caution in the belief' of guilt. *Carroll* v. *United States*, 267 U.S. 132, 162."

ously given information to the police do not apply.[36] For the purpose of finding probable cause in this case, reliability is demonstrated by the identity, occupations and the very words of the persons who gave the information to the arresting officers.[37]

Since the arrest of Petitioner was based upon probable cause, it follows that the subsequent custody was lawful. Pursuant to this custody, *and as an incident of it*, the police took Petitioner's clothing for the purpose of subjecting it to laboratory analysis. The cases sustaining as reasonable, and therefore, constitutional, this action on the part of law enforcement officials are both universal and unanimous.[38]

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36. "Experienced stool pigeons are not the only source of credible information, and the tests of reliability which must be applied to such persons are not necessarily applicable to every citizen who assists the police." *People* v. *Lewis*, 240 Cal. App. 2d 546, 549, 49 Cal. Reptr. 579, 582 (1966). See also *People* v. *Williams*, 368 Mich. 494, 118 N.W. 2d 391 (1962); *People* v. *Wolfe*, 147 N.W. 2d 447 (Mich. App. 1967); *People* v. *Johnson*, 76 Cal. Reptr. 768 (Cal. App. 1969); *Reed* v. *United States*, 402 F. 2d 756, 758-61 (8th Cir. 1968).

37. *Cf. Spinelli* v. *United States*, —— U.S. ——, 89 S. Ct. 584, 592-94 (1969) (concurring opinion of Mr. Justice White).

38. *United States* v. *Caruso*, 358 F. 2d 184 (2d Cir. 1966); *Gollihar* v. *United States*, 362 F. 2d 549 (8th Cir. 1966); *Robinson* v. *United States*, 283 F. 2d 508 (D.C. Cir. 1965); *United States* v. *Guido*, 251 F. 2d 1 (7th Cir. 1958); *State* v. *Mark*, 46 N.J. 262, 246 A. 2d 377 (1966); *People* v. *Shaw*, 327 Cal. App. 2d 606, 47 Cal. Rptr. 96, *cert. den.* 384 U.S. 964 (1965); *State* v. *Dill*, 277 Minn. 40, 151 N.W. 2d

Here there was no "search" in the ordinary sense of that term. Petitioner's clothes were displayed to the arresting officers, indeed, to the world, at the time of his arrest and custody. Though there was a "seizure" of the garments, it was undertaken upon probable cause to believe that scientific examination would yield vital and relevant evidence in the investigation of the death of Mrs. Keane.[39]

If the arrest which produced the custody was undertaken on probable cause; if the custody which produced the clothing was therefore valid; if the seizure of the clothing rested, as well, upon probable cause to believe that probative evidence of criminal guilt would thereby be found, then the actions of the police did not violate the Fourth Amendment and the motion to suppress was properly overruled.

413 (1967); *Carter* v. *Commonwealth*, 209 Va. 317, 163 S.E. 2d 589 (1968); *State* v. *Menard*, 331 S.W. 2d 521 (Mo. 1960); *State* v. *Phillips*, 262 Wis. 303, 55 N.W. 2d 384 (1952); *Sheppard* v. *State*, 394 S.W. 2d 624 (Ark. 1965); *State* v. *Post*, 255 Iowa 573, 123 N.W. 2d 11 (1963).

39. *Schmerber* v. *California*, 384 U.S. 757 (1966).

CONCLUSION

The People of the State of Illinois respectfully request that the judgment of the Supreme Court of Illinois be affirmed.

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OCTOBER TERM, [redacted] 1969

No. [redacted]
54

LEE ARTHUR HESTER,

Petitioner,

vs.

ILLINOIS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1233

LEE ARTHUR HESTER,

Petitioner,

vs.

ILLINOIS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

(a) Opinions Below

The majority and dissenting opinions of the Supreme Court of Illinois are reported in 39 Ill. 2d 489, 237 N.E. 2d 466, and are printed beginning at page 26 of the Record in the Supreme Court of Illinois.

(b) Jurisdiction

1. The opinion and judgment of the Supreme Court of Illinois affirming the judgment of the Circuit Court of

Cook County, Illinois, Criminal Division, were entered on March 28, 1968. (Record in Illinois Supreme Court 261)

2. On April 17, 1968, in accordance with Illinois Supreme Court Rule 367, pursuant to a motion timely filed, an order was entered by the Supreme Court of Illinois granting the petitioner until May 9, 1968, to file a Petition for Rehearing, which was filed on May 8, 1968, and denied on May 27, 1968. (Record in Ill. Sup. Ct. 29, 30, 31).

3. Petition for writ of certiorari, filed August 15, 1968, was granted on April 7, 1969.

4. The jurisdiction of this Court is invoked under 28 U.S.C., Sect. 1257(3).

(c) Constitutional and Statutory Provisions Involved

(See Appendix)

United States Constitution, Fourth Amendment
United States Constitution, Fifth Amendment
United States Constitution, Sixth Amendment
United States Constitution, Fourteenth Amendment, Section 1
Criminal Code of Illinois, Illinois Revised Statutes, 1959, Chap. 38, Sect. 660
Illinois Family Court Act, 1959, Chap. 23, Sects. 2001, 2012, 2014, 2021
Chap. 38, Sect. 64; Illinois Revised Statutes, 1961

R is designation used to refer to pages of the trial record (report of proceedings in the trial court labeled on the front cover of each volume by the Court reporter as Bill of Exceptions), 4 black bound volumes totalling 3228 pages and numbered as volumes II, III, IV and V. Record in the Illinois Supreme Court is used to refer to the proceedings in that Court.

(d) Questions Presented

I(a). Can the petitioner's conviction stand where the conviction is based in whole or in part on the secret and incommunicado taking, during a period of unlawful detention, of the oral and written confessions of a 14 year old Negro boy in the fifth grade of grammar school, with severely limited intelligence, without counsel, parent or anyone else to stand in loco parentis to him, without adherence to any of his constitutional rights or advice or knowledge of the same and under the conditions more fully described herein, in the statement of the case and facts material thereto?

(b). The taking of confessions from young children is by its very nature so repugnant to due process that such confessions must by their very nature be deemed inadmissible and the rule of exclusion applied to the same.

(c). The detention of this petitioner was unlawful. The *McNabb-Mallory Rule* should be applied, at least in the fact situation here, to State Court convictions, not only as a rule of federal procedure but also as a rule of federal constitutional law applicable to the individual States of the Union.

(d). The petitioner is an innocent boy. A de novo examination of the record must be made concerning guilt or innocence, which will establish not only that the confessions are untrustworthy, unreliable and incredible but also involuntary, for the petitioner confessed to that which he could not and did not do.

II. The protections required in juvenile proceedings pursuant to the dictates of the *Application of Gault*, 387 U.S.

It must be applied retroactively here to prevent the taking of secret and incommunicado confessions from very young children with severely limited intelligence.

III(a). Is a defendant accorded his constitutional right to due process and the effective assistance of counsel where the psychiatrist called to testify in behalf of the accused was not only not permitted to testify as to his examination of the accused and what it disclosed, but also from testifying as to whether or not the defendant was susceptible to psychological coercion?

III(b). It was a violation of due process to refuse to permit defense counsel to view and inspect the complete police case report and police complaint form and notes, memoranda and test data made available to the prosecution by the police but not to the defense, the results of such test data being heavily relied on by the prosecution as it related to certain important physical evidence before the jury.

IV. Was there a lawful search and seizure of the defendant's clothing and articles contained therein subsequent to an arrest made by a "dope pusher" policeman whose own testimony showed the lack of reasonable grounds and probable cause to make such an arrest?

CLR is hereinafter used to refer to pages of the Common Law Record which is blue bound and is volume No. 1 of the Trial Record and which contains the pleadings in the trial court and the rulings thereon, totalling 385 pages, plus one green backed folder made part of the Common Law Record by an order of the Supreme Court of Illinois on December 27, 1966, and bearing Family Court of Cook County No. 264066.

(c) Statement of the Case

The petitioner was indicted at the April, 1961 Term of the Cook County Grand Jury for the murder (to which there were no eye witnesses) on April 20, 1961, of a school teacher at the Lewis-Champlin Elementary School, where petitioner was a student in a third floor classroom in that school. The teacher's body was found in the ground floor bookroom at 4:00 P.M., on April 20, 1961. The indictment was returned on April 28, 1961, and the petitioner was arraigned and pleaded not guilty to the indictment on May 5, 1961. On October 9, 1961, a jury found him guilty of murder and sentenced him to serve 55 years in the Illinois State Penitentiary. The defendant, a Negro boy, was then 14 years of age, he having turned 14 five days before his arrest. [R. 9, 3136, 3217-3218]. Motions in arrest of judgment and for a new trial were made and both were denied. [R. 3148-3216].

The petitioner was arrested without a warrant outside of his fifth grade classroom at 8:00 A.M. on April 21, 1961 [1111-1130, 1137-1165, 1166-1192, R. 2828-2843, 2844-2855], by Officer Sheldon R. Feller of the Chicago Police Department, 16 hours after the body of a woman teacher was found dead, obviously the victim of a murder. Officer Feller was acquitted on March 18, 1961, by a directed verdict of acquittal in the Federal District Court in Chicago, of numerous narcotics laws violations, including the

Record in Ill. Sup. Ct. ____ is hereinafter used to refer to pages of the record of proceedings in the Supreme Court of Illinois, a brown bound volume with entries numbered 1 to 33. The Court is advised that the Common Law Record, the transcript of proceedings or Bill of Exceptions, and the record in the Supreme Court of Illinois are each separately paginated.

sale of heroin." On November 10, 1966, Officer Teller was convicted in that same court of selling heroin and was sentenced to serve five concurrent terms of 18 years each in a federal prison. Just prior to Hester's arrest, Teller was reinstated to the Chicago Police Department amidst flurries of publicity of his "ordeal and his redemption" [See C.I.R. 207-294 and pp. 146-147 of petitioner's brief to the Supreme Court of Illinois].

Officer Teller was indicted on September 2, 1959 and September 8, 1959 by indictments in the United States District Court for the Northern District of Illinois, Eastern Division, 59 C.R. 166, and 59 C.R. 167, charging the said Sheldon E. Teller with conspiracy to violate the narcotic laws of the United States and with the unlawful sale of narcotic drugs (including heroin), etc. Teller was indicted in 59 C.R. 166 (conspiracy to violate the narcotics laws of the United States) with two other Chicago Police officers, Miles Cooperman and Richard E. Austin, and ten other defendants. The cases of all three officers never reached the jury to try them, for the trial judge granted judgments of acquittal to Teller, Cooperman and Austin on 59 C.R. 166 on March 7, 1961, and on 59 C.R. 167 (on which Teller alone was named) on March 15, 1961, just one month and two days before Teller's arrest of the petitioner, Hester. As for the other ten defendants only one was found not guilty by the trial jury. The Government dismissed the cases of two defendants during trial, one died during trial, four received terms in the penitentiary ranging from 5 to 12 years and two were given new trials. Indictments were later dismissed. On July 26, 1960, Teller was again indicted, this time with John D. Sullivan, also a Chicago Police officer, in a five count indictment in the United States District Court for the Northern District of Illinois, Eastern Division, 60 C.R. 179, charging the sale, concealment, barter and exchange of heroin, and with receiving, concealing and facilitating the transportation of marihuana. Sullivan was charged with only two of the five counts. Both officers were charged with selling heroin right from the Chicago Police Department squad car they operated and were convicted by a jury on November 10, 1961. Teller was sentenced to five concurrent 18 year terms in prison and Sullivan to two concurrent 5 year terms. Teller being placed on appeal bond and presently serving in the Leavenworth, Kansas Federal Penitentiary. Teller's wife, Leah Jayne Teller, was also indicted on July 26, 1960 in the same court as 60 C.R. 180 for the sale and concealment, etc. of narcotics

Teller and another officer interrogated the petitioner outside of his third floor classroom and in the grade school assembly hall from 8:00 A.M. to sometime after 8:45 A.M. and before 9:00 A.M. [R. 447-448, 449-452, 454-462, 621-623, 1122-1125, 1137-1140, 1166-1173, 1185, 1190], then turned him over to other Chicago policemen [R. 458-462, 1125, 1137, 1190-1191] who then turned the petitioner over to two Negro policemen assigned to the Chicago Police Department Youth Division, who took Hester to the Cook County Juvenile Detention Home (Audy Home), where, at sometime between 10:00 A.M. and 10:30 A.M., they searched him without a warrant and took all of his clothing and the contents thereof (including one or two marbles) from him, a white gown then given him to wear [R. 447-484, 471, 747-766, 1575-1605, 1898-1914, 2357-2374], after which the petitioner remained in the custody of these officers until 10:30 A.M. or 10:35 A.M. [R. 314-318, 320-322, 468-477, 761-767], at which time he was transferred to a barred room [R. 2884-2885] referred to by the petitioner as a dungeon room [R. 472-473] where he was forced to stay until about 4:00 P.M. on April 21, 1961 [R. 468-477, 2363, 2371-2373,

(three counts) and was convicted on September 27, 1966, in a bench trial of all three counts (a new trial being granted on counts 2 and 3 the Government then dismissing the same) and was sentenced to five years in a federal prison. She is presently serving her sentence at the Alderson, West Virginia Federal Penitentiary for Women.

Prior to his sentencing on November 10, 1966, Teller was given an opportunity by Judge James B. Parsons to make a statement, which he did. Included in his boasts about his police work record was his statement that "The first bad case Orlando Wilson ever had in this town when Mrs. Keane, a schoolteacher, was killed by Joe Arthur Hester, I solved that case all by myself." Emphasis supplied. Page 24 of hearing of Nov. 10, 1966 in U.S. Docket No. 19617, U.S. Court of Appeals, 7th Circuit. Orlando Wilson was Chicago Police Superintendent

against self-incrimination while doing violence to the pervading principle of that proscription; they keep the word of promise to the ear of the illegally detained and break it to their hope. (*Griffin* v. *Illinois*, 351 U.S. 12, at page 24, concurring opinion of Mr. Justice Frankfurter).

Under the inescapable facts of life in a world of reality, the *ratio decidendi* of Rule 5(a) and the *McNabb-Mallory* doctrine is to preclude the police from benefiting from their own lawlessness. Since the doctrine truly sounds in the Fifth Amendment, the only way to make it effective is by an exclusionary rule imposed upon the States as was the Fourth Amendment in *Mapp* v. *Ohio*, 367 U. S. 643.

The Self-Incrimination Clause of the Fifth Amendment no less than the Unreasonable Search and Seizure Clause of the Fourth Amendment is binding upon the States through the Due Process Clause of the Fourteenth (*Malloy* v. *Hogan*, 378 U. S. 1). If this Court wants it to be obeyed, then your Honors must impose an exclusionary rule upon confessions obtained during illegal detention.

1(d). The Supreme Court of Illinois affirmed the conviction of an innocent boy. Not only did the petitioner unequivocally deny his guilt in a truth serum test but the physical evidence itself pointed to the innocence of the petitioner.

While it is true that the issue of guilt or innocence is generally not one for the Supreme Court of the United States, nevertheless, in this case these issues and the confessions are so intertwined and interrelated that the questions of voluntariness and credibility cannot be separated from the questions of guilt or innocence, for the portrayal

of the incredibility and involuntariness of the confessions is significantly assisted and exemplified by observing that the petitioner confessed to what the physical evidence showed he not only did not do, but could not do. The admissions made in a "confession" cannot be summarily accepted without question. There are things that one can "confess" to that the facts depict as either unlikely or impossible. Courts are therefore not required to wear blinders in this type of case, but must realize that the more unlikely the facts admitted the less likely is it that the confession is voluntary; especially where the confession is taken from an illiterate 14 year old boy.

II. The requirements of *In re Gault,* 387 U.S. 1, must be applied retroactively. Not only is a child in need of the same procedural protections accorded to an adult from arrest through trial, but because of his youth, he is entitled to even greater protection. Because confessions are undeniably given great weight by a jury, anything affecting the trustworthiness thereof must be examined with boundless scrutiny. The protections *Gault* requires must be applied to all critical stages of a criminal proceedings. Certainly the taking of a confession from a 14 year old virtually illiterate boy is a critical stage of the proceedings.

The taking of a confession from a child like Lee Arthur Hester and the use of the same in evidence affects the very integrity of the fact finding process and presents a very real danger of convicting the innocent. The reliability of such a confession is always highly questionable, and in the case of Lee Arthur Hester, unworthy of belief. Therefore, the entire fact finding process is suspect, which is no different than the retroactive effect given by the Supreme Court of the United States to the right to be represented

by counsel, to the exclusion of coerced confessions from evidence to the entitlement to a transcript with which to appeal, and to the prohibition against a death penalty verdict from a jury organized to convict.

This is especially true in the case at bar because the petitioner was first held in the juvenile home (the Audy Home) of Cook County, Illinois, and interrogated in the juvenile court (called the Family Court) building. Some twelve hours after his interrogation a petition to have him declared a juvenile delinquent was filed in the Family Court of Cook County, Illinois, which petition to this very day remains undisposed of. The petitioner was prosecuted for murder as an adult even though an Illinois statute if properly applied required the consent of the Family Court to so prosecute the petitioner. In addition, the Illinois Family Court Act rendered inadmissible in all subsequent criminal proceedings any admissions or confessions taken from a juvenile by an officer of the Family Court.

Gault points up a glaring necessity—if confessions can be taken from children, then they are entitled to at least the same safeguards given to an adult, plus that quantum of additional safeguards necessary to equalize the relative positions of juvenile and adult, much the same as the weight handicap assigned a superior race horse in an attempt to equalize the competition or the pin handicap given a less accomplished bowler competing against one more skilled so that the contest contains the balance that only equality of ability can give it.

The same principle must be applied in the law. It is defined in one word—"fairness"—that priceless element that is the foundation of our adversarial system. In order

to give the child the same protection as an adult when confessions are concerned, it is therefore necessary to "add pins" to the child's score or have him "carry less pounds." The only way to do this is by giving additional protection to the child and providing him with additional safeguards so as to bring him up to parity with the adult. Therefore, before any interrogation they should provide the child with counsel, advise the child's parents of his whereabouts and wait for them to arrive, make sure that the child is fully apprised of his rights and avoid the compelling atmosphere of in custody interrogation.

Since the child can seldom (if ever) appreciate the significance of his constitutional rights and since the trustworthiness of what he says is doubtful, the best rule to follow is to never take a confession from a child. The law should solidify this desirability by not permittting confessions to be taken from juveniles, and if this rule is not obeyed, an exclusionary rule should prevent the use of such confession.

III(a). The susceptibility of the petitioner to psychological coercion and threats of force and promises of reward was of the utmost importance to the petitioner's defense. The psychiatrist was virtually prohibited from any meaningful testimony in support of such defenses. The psychiatrist testified as to having examined the petitioner on two separate occasions. He talked with and observed the petitioner and as a result was able to draw conclusions therefrom. Here we are dealing with the interrogation of a child, one with a mentality in the neighborhood of eight years old. The success of the prosecution in keeping out such testimony served only to prevent the petitioner from showing that he was coerced into making a confession.

Even if testimony concerning the truth serum test was properly excluded the remaining testimony was highly relevant to the petitioner's defense. Once the prosecution knew that the defendant passed a truth serum test and because the prosecution well knew that the petitioner was virtually illiterate and extremely likely to confess to what he did not do, the People of the State of Illinois made every effort to keep out the psychiatric testimony. The essential fairness required in a criminal proceeding is as much a part of due process as the right to counsel or the right to remain silent. The refusal to allow the psychiatrist to testify meaningfully therefore denied the petitioner the fundamental fairness guaranteed him by the Constitution and served only to contribute in a significant manner to his conviction, when such testimony might have enabled the jury to conclude otherwise.

III(b). Not only did the petitioner's counsel file pretrial motions for the complete police report and police complaint form plus notes, memoranda and test data of the Chicago Police Department Criminal Laboratory, but the same items were properly subpoenaed. Nevertheless, the Court refused to allow defense counsel to see any of these items. The trial here was replete with scientific and medical testimony and many witnesses. Without adequate time to examine the items requested it was not possible to give the defendant a fair trial. If there was nothing tainted about the State's case, there could be no reason to deny access to the information requested.

The Court even promised defense counsel that at trial they could see the notes of the crime lab people, but when the trial judge was reminded of this at the time a crime lab technician took the stand and was asked for his test

notes, the trial judge denied the right to see the same. No matter how the cause is approached, the police and the prosecution are on the same team. If the prosecution has access to the complete police investigation, scientific and otherwise, there can be no fundamental fairness in precluding the defense access thereto. Not only is the defendant thereby denied the opportunity to properly defend himself (which is really a denial of a fair trial), but he is also denied the effective assistance of counsel, for without the information necessary to provide an adequate defense counsel cannot be effective.

IV. The clothing and other articles taken from the petitioner were taken after his arrest had long since been accomplished and were therefore not taken incidental to a lawful arrest. The arrest itself was not based on probable cause, for Hester's name was never even known to the arresting officers, Teller and Pruneke, until it was mentioned in the most careless and uncalled for ways by a clerk in the principal's office and a gym teacher about Hester's alleged involvement in a discipline case, the gym teacher saying that "I had only heard that he was involved in some sort of discipline case." [R. 1086]. In fact the mother of the other boy allegedly involved was told that "it was not a school case and she should report it to the police." Certainly, if there were any validity to the matter, Hester would not have been permitted to stay in school.

Not only was this unreliable hearsay, thereby precluding probable cause to arrest the petitioner, but there was no reason why the officers could not have sought a warrant at this time for Hester's arrest and his search. He was in school, other officers could have watched his room to prevent his leaving, if necessary, the courts were open and functioning and there was no danger of evidence being lost

or the requirement of fresh pursuit. There were no exigent circumstances to excuse the failure to secure a warrant (both for Hester's arrest and his search).

(g) Argument

I(a).

Can the Petitioner's Conviction Stand Where the Conviction Is Based in Whole or in Part on the Secret and Incommunicado Taking, During a Period of Unlawful Detention, of the Oral and Written Confessions of a 14 Year Old Negro Boy in the Fifth Grade of Grammar School, With Severely Limited Intelligence, Without Counsel, Parent or Anyone Else to Stand in Loco Parentis to Him, Without Adherence to Any of His Constitutional Rights or Advice or Knowledge of the Same and Under the Conditions More Fully Described Herein in the Statement of the Case and the Facts Material Thereto?

One would indeed be hard pressed to find a case concerning a confession from a petitioner as young mentally and chronologically as this petitioner. In fact Lee Arthur Hester is probably the youngest defendant ever to have certiorari granted by this Court. A search of decisions reveals four cases of defendants of nearly the same age. Reference is made to *Davis* v. *Mississippi*, —— U.S. ——, 22 L.Ed. 2d 676; *In Re Whittington*, 391 U.S. 341; *Gallegos* v. *Colorado*, 370 U. S. 49; and *Haley* v. *Ohio*, 332 U. S. 596. The mere taking of a confession from such an individual as Lee Arthur Hester is violative of due process even if the safeguards described in *Miranda* v. *Arizona*, 384 U. S. 436, are scrupulously adhered to. The petitioner was so young and so incapable that to take a confession from him in any

manner should cloak the same with the presumption of involuntariness. In another dissent where a confession was taken from a 15 year old, eighth grade boy, by an assistant state's attorney, no lawyer being provided the boy, Mr. Justice Schaefer said that "this defendant's right to counsel certainly attached when the prosecution found it necessary to use an attorney in questioning him." See *People* v. *Richardson*, 32 Ill. 2d 472, 207 N. E. 2d 478, 481. The petitioner faced the same imbalance.

See *Haley* v. *Ohio*, 332 U. S. 596, 600, where the Court said that the "secret treatment of a 15 year old boy behind closed doors in the dead of night becomes darkly suspicious." It must be remembered that Haley was then a senior in high school, at age 15, and the petitioner in the fifth grade of grammar school at age 14. To the same extent is *Gallegos* v. *Colorado*, 370 U. S. 49, 54.

See also *Greenwald* v. *Wisconsin*, 390 U. S. 519, where this Court held involuntary the confession of a 30 year old man who was no stranger to the criminal law and who had a ninth grade education. Greenwald was in custody 12½ hours before confessing and was questioned for a total of 3½ hours (not all at once) and was not actually physically abused and who never asked for the food and medication he claims was denied him.

It is significant that on July 28, 1961, the Illinois Legislature enacted the following statute:

> "No person shall be convicted of any offense unless he had attained his 13th birthday at the time his offense was committed."
>
> (Chapter 38, Sect. 6-1, Ill. Rev. Stats. 1961, Effective January 1, 1962).

Hester's trial commenced on September 21, 1961, less than two months after the enactment of the above statute and slightly more than three months prior to the effective date of the same. Therefore, Hester was only one year and five days beyond an age the Illinois Legislature said precluded criminal responsibility. There is no doubt that mentally Hester in no way approached the age of 13.

The thinking of the Legislature is evident, namely, that children cannot be placed in the same category with adults as far as criminal responsibility is concerned. The same reasoning must be applied to the interrogation of children —they cannot be categorized as adults—first they need more protection, and second, what they say cannot be relied on as trustworthy.

The totality of circumstances test required by *Clewis* v. *Texas*, 386 U. S. 707, 708; *Davis* v. *North Carolina*, 384 U. S. 737; and *Haynes* v. *Washington*, 373 U. S. 503, if properly applied by the Supreme Court of Illinois, would have resulted in reversal of the petitioner's conviction. [See page 5 of the opinion of the Illinois Supreme Court—beginning at page 26 of the Record in the Ill. Sup. Ct.]. In Mr. Justice Schaefer's dissent he states that the petitioner was convicted largely on the basis of his written confession and that the prosecution failed to meet its burden of proving this confession was voluntary. 39 Ill. 2d 489, 518.

Even the State's Attorney of Cook County was unconcerned that he was questioning an almost illiterate child, for when he was asked whether during his taking of the defendant's written confession "Did you ever call his mother or father and tell them that you were questioning him?", he answered "No, sir." This takes on added sig-

nificance in view of the fact that the assistant state's attorney who took the written confession first questioned the petitioner thoroughly outside the Court reporter's presence and then after he had the story straight called in the Court reporter. [R. 2005-2019]. One wonders why the interrogators waited 2½ hours after the said "confession" to take the written confession.

Significant weight was attached to the fact that the petitioner was a Negro with a fifth grade education (but married) and had apparently never been in trouble with the law before in *Clewis* v. *Texas*, 386 U. S. 707, 712. Hester's low mentality, his extreme youth, his lack of experience with the law and with life in general, his poor Negro slum background, his abnormal fear of physical injury and of large and older males [R. 2332-2334] and the 12½ hours of petitioner's incommunicado detention and interrogation were equivalent to the nine days Clewis was held. The Supreme Court of Illinois held that "the defendant's mental age and abilities would have been at least equal to those of a normal 11-year-old child at the time he confessed to the crime." 39 Ill. 2d 489, 500. Hester's mentality was actually subnormal, thereby depriving him of the capacity to understand the meaning and effect of his "confession". Evidently that Court felt that a "normal 11-year-old" is not coercible, even though his mental age is already three years behind his chronological age.

The school records of Lee Arthur Hester plus the testimony of Dr. William Canning, the Chicago Board of Education psychologist in charge of the testing that resulted in a substantial portion of these records, were uncontradicted that Hester at the very best could not expect to have a mental age grade expectancy greater than the fourth grade,

which is the equivalent of 9 years of age. The significance of this cannot be overstated because it established (with absolutely no rebuttal by the State) that at the time of the examination, January 23, 1959, the most that could be hoped for was that Hester would attain the maximum mental age of 9. [See Def. Ex. 14(D)—Report of Examination—Def. Ex. 14(A) through 14(G), R. 2219-2225, 2486-2509] [See Back of Vol. V of Record for the Actual Exhibit].

Even if this case is examined in light of the pre-*Miranda*, *Escobedo* and *Gault* decisions and without consideration of the retroactivity, or prospectivity of these and other decisions spelling out the rights of defendants in criminal proceedings, the confession taken from Hester still requires suppression. An examination must therefore be made of those earlier cases where this Court made an independent determination of the voluntariness of the confession taken. An application of the principles set forth in those cases to the case at bar requires a finding that Hester's confession was involuntary. Compared to Hester, *Gallegos* and *Haley* bordered on genius. See *Gallegos* v. *Colorado*, 370 U. S. 49; *Haley* v. *Ohio*, 332 U. S. 596.

There is little difference between the *Haley* case and the instant case. Haley was about one and one-half years older and a senior in high school (at 15 years of age) where the usual age for a high school senior is 17 or 18. Haley was therefore at least seven school years ahead of Hester and approximately ten mental years ahead of Hester (assuming a senior in high school is 17 or 18 mentally). Hester was in fifth grade, but only a second grader (age 7) in accomplishment. [See Def. Ex. 14(A) through (G), R. 2219-2225, 2486-2509]. Haley was detained five hours before his written confession. Hester was detained 12½ hours before his

Both were Negro and neither were provided with counsel or advised they were entitled to counsel. Aside from the anemic warning given Haley neither he nor Hester were advised of any of their other constitutional rights. In both instances there is secret detention and questioning by large numbers of policemen. Certainly if the confession in *Haley* is inadmissible, similar treatment must be accorded Hester, who is the youngest defendant in any case ever decided by the Supreme Court of the United States where the issues of the voluntariness of a confession and the propriety of taking the same are raised. In fact, Lee Arthur Hester is probably the youngest petitioner to ever present a criminal case to this Court.

The following words from *Haley* v. *Ohio*, 332 U. S. 596, 599, ring with resounding authority and are an unavoidable mandate to provide counsel to any defendant of young and tender years:

> " . . . But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law as he knows it, crush him . . . No lawyer stood guard to make sure they went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. *No counsel or friend was called during the critical hours of questioning . . . not even a gesture towards getting a lawyer for him was even made.*" (emphasis supplied).

See Footnote 2 in *Boulden* v. *Holman*, —— U.S. ——, 22 L. Ed. 2d, 433, 441, where Mr. Justice Harlan (in his

dissent where he suggests the coerced confession as an issue on remand; this issue was not remanded by the majority) said "It may additionally be noted that petitioner in the present case was a slight, sickly youth, with an I.Q. of 83."

If *Haley* were not enough, next came *Gallegos* v. *Colorado*, 370 U. S. 49, in which a 14 year old boy immediately after his arrest admitted a robbery and assault of an elderly man who died 25 days after the defendant's arrest, during which time the defendant was detained in Juvenile Hall (similar to the Audy Home in Chicago). The day after his arrest the defendant made a confession recorded in longhand by an officer. The next day a juvenile complaint was filed against the defendant and 14 days later he was committed to the State Industrial School for Boys. Six days after his arrest the defendant signed a formal confession and at no time prior thereto did he see a lawyer, parent or other friendly adult.

There was absolutely no justification for not taking Hester before a magistrate or other judicial officer for two weeks (from April 21, 1961 to May 5, 1961). It is no excuse that the State "already had his confession." Why? Why? Why? There can be but one answer—the state was not anxious for the inquiry that a judicial officer would have been duty bound to make. In *Gallegos* (at 370 U. S. 53) the Court in referring to *Haley* v. *Ohio*, noted that the youth of the suspect was the crucial factor in *Haley* and that the fact that petitioner was only 14 years old put Gallegos on the same footing as Haley.

The following statement by the Court is of particular importance (P. 54):

"There was here no evidence of prolonged questioning. But the five day detention—during which time the boy's mother unsuccessfully tried to see him and he was cut off from contact with any lawyer or adult advisor—gives the case an ominous cast. The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14 year old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights."

In *Gallegos* the prosecution argued that the youth and immaturity of the defendant and his detention were immaterial because the basic ingredients of the confession came tumbling out as soon as he was arrested. See also *Haynes* v. *State of Washington*, 373 U. S. 503, where the basic ingredients of a confession came tumbling out immediately, but the Supreme Court of the United States held his later written and signed confession was inadmissible. Haynes was a grown married man who twice orally confessed within twenty minutes of his arrest, including once en route to the police station, the robbery of a gas station. The first confessions were slightly more than one-half hour after the robbery. But the Supreme Court of the United States in *Gallegos* (at 370 U. S. 54) stated that

"if we took that position, it would, with all deference, be in callous disregard of this boy's constitutional

> rights . . . A lawyer or an adult relative or friend could have given the petitioner the protection which his own maturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights . . . The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend—all these combine to make us conclude that the formal confession on which this conviction may have rested (See *Payne* v. *Arkansas*, 356 U. S. 560, 568 . . .) was obtained in violation of due process."

Lee Arthur Hester's parents were not sent for, nor was he brought before the Juvenile Court (even though the Family Court Act required this), nor was he furnished with a lawyer or a friend. The circumstances are almost identical to *Gallegos*, plus the fact that Lee Arthur Hester was physically threatened with having "the two white officers throw his head through the wall", and that he was promised he could go home if he confessed and that his mother was coming to take him home. [R. 485-487, 2377].

In addition, Gallegos made his first (oral) confession immediately after his arrest, whereas Lee Arthur Hester did not make his first admissions (oral) until some time after 4:00 P.M. or more than eight hours after his arrest. It is important to note that not one iota of coercion, physi-

cal or otherwise, is discussed in *Gallegos*. The decision rests entirely on secret detention of a 14 year old boy who gives a confession during such detention.

There is therefore, no doubt that where a defendant is as young as Hester is, the rule of law to be applied (without regard to the requirements of *Miranda* v. *Arizona*) is that irrespective of the pressure applied to bend the will, failure to provide counsel (or some other friend) will render a confession taken during secret detention of one so young inadmissible.

Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. *Miranda* v. *Arizona*, 384 U. S. 436, 448. When to such privacy you add an I.Q. of 75-82, a reading level of second grade, a maximum emotional growth of fourth grade, it is impossible to conceive that a confession taken from such a child is credible, let alone voluntary. Hester's oral statements between 4:00 and 4:25 P.M. on April 21, 1961, cannot be separated from the written "confession" signed almost four hours later. There was no break in the stream of events from arrest at 8:00 A.M. on April 21, 1961, until the signing of the written confession 12½ hours later, which is squarely in point with the holding in *Darwin* v. *Connecticut*, 391 U. S. 436.

Every witness who the prosecution claims had anything to do with taking the purported confessions from the defendant, Officers Teller, Pruneke, Perkins, Thomas, Keating and Killackey, Assistant State's Attorney Garippo and Court reporter Flannery, were asked if the defendant was advised of his right to remain silent, that whatever he said could be used as evidence against him, whether the defendant had the assistance of counsel and whether he was

advised that he was entitled to counsel; and that to each such question they replied no such warning or advice was given. These witnesses were also asked whether the defendant's parents were advised of his whereabouts and whether any friend or probation officer or other person stood by to counsel and assist the defendant while he was being interrogated. The replies to these questions were also that no such warning and advice was given. [R. 325-329, 353, 362-365, 650-651, 658, 815, 820-821, 876, 892-893, 933-934, 994, 1940-1941, 1949-1952, 1994-1995, 2009-2010, 2020, 2024, 2137-2146, 2875-2876, 2910-2911].

It just does not sound credible for each of the prosecution witnesses to state that the defendant never asked for his mother. This must be taken with quite a large grain of salt in view of the defendant's unhesitating testimony that he repeatedly asked to call his mother. [R. 520-522, 2391].

In *Fikes* v. *Alabama*, 352 U. S. 191, 193 the Supreme Court of the United States stated that "It is of course highly material to the question before this Court to ascertain petitioner's character and background. He is a negro, 27 years old in 1953, who started school at age 8 and left at 16 while still in the third grade." At page 196 the Court commented on the lack of physical brutality present in other cases decided by the Court and then said that Fikes ". . . was a weaker and more susceptible subject than the record in that case reveals." (Referring to *Turner* v. *Pennsylvania*, 338 U. S. 62). No testimony as to Hester's susceptibility to psychological coercion was permitted [R. 2279-2337], thereby preventing a showing that the same coercive factors present in *Fikes* were present in the case at bar.

"Here the prisoner was an uneducated negro, certainly of low mentality, if not mentally ill." *Fikes* v. *Alabama*, 352 U. S. 191, 196. "We hold that the circumstances of pressure applied against the power of resistance of this petitioner, who cannot be deemed other than weak of will or mind, deprived him of due process of law. So viewed, the judgment of conviction in this case cannot stand." *Fikes* v. *Alabama*, 352 U. S. 191, 198.

See *In the Interests of Carlo and Stasilowicz*, 48 N. J. 224, where the Supreme Court of New Jersey held the confessions of two boys, 13 and 15, involuntary, stressing that the parents of both boys were not allowed to see them while they were being interrogated (which the Court held alone might be enough to show that the confessions were involuntary, even though, as the police testified, the boys did not wish to see their parents, citing *Gallegos* v. *Colorado*, 370 U. S. 49), that inconsistencies appeared among the various statements of the boys and with the objective evidence of the crime. The Court held that even if the boys were advised of their rights this should not be given significant weight in the determination of voluntariness (quoting from *Haley* v. *Ohio*, 332 U. S. 596, 601, where the State also said it gave warnings to 15 year old Haley).

The entire majority opinion in the *Application of Gault*, 387 U. S. 1, has for its central theme just what is due process for children. The decision leaves little doubt that a confession could not be taken from a child without the protections now required by *Miranda* for adults. A confession so taken from a child is "testimonially untrustworthy" (at 387 U. S. 45) and must be excluded from evidence. This is true even if the world of criminal law had never heard of *Miranda* v. *Arizona*, 384 U. S. 436. Had

the pretrial rights of a child been squarely presented in *Gault* there could have been no other conclusion. See also *In Re Whittington*, 391 U. S. 341.

The strong dissent of Mr. Justice Schaefer (who also dissented in *People* v. *Hester*) in *People* v. *Richardson*, 32 Ill. 2d 482, 207 N. E. 2d 478, a case where trial commenced prior to both *Escobedo* and *Miranda*, offers persuasive and convincing authority for finding that the oral and written statements taken from Lee Arthur Hester violated those constitutional rights of Hester heretofore discussed.

In *Richardson*, the police officers interrogated the defendant and secured admissions after which a statement in question and answer form was taken from the defendant by an Assistant States Attorney. Justice Schaefer concluded at page 481 (of 207 N. E. 2d) that in his opinion

> "the statement taken . . . by an Assistant States Attorney was inadmissible under the decision of the Supreme Court of the United States in *Escobedo* v. *State of Illinois*, 378 U. S. 478 . . . whether the opinion in that case is read broadly or narrowly."

Justice Schaefer went on to say at page 481 (of 207 N. E. 2d)

> "This defendant was fifteen years old and in eighth grade. Whatever may have been the situation during his interrogation by police officers, this defendant's right to counsel certainly attached when the prosecution found it necessary to use an attorney in questioning him. At least at that point he was entitled to be told that he need not answer questions, and to be advised of his right to counsel."

It is important to note that in *Richardson* the defendant was arrested at his home in the presence of his father—NOT SO WITH HESTER.

In *Richardson*, the defendant's father knew where the defendant was taken—NOT SO WITH HESTER.

In *Richardson*, the defendant was informed of his right to remain silent—NOT SO WITH HESTER.

In short, Hester was even deprived of those safeguards which appear to have been employed in *Richardson*. In fact, the record in the instant case is horrifying in its lack of employment of *any* procedural safeguards by the police or States Attorney's office regarding statements taken from the defendant.

It is not enough that the petitioner testified to coercion and the police officers denied it. One could not recover from the shock if they did otherwise. No one was present to protect the petitioner and witness his interrogation. There is therefore only the petitioner, a fifth grade kindergarten reject, to offer rebuttal to the testimony of these officers. Although it is difficult to determine from *Jackson* v. *Denno*, 378 U. S. 368, who has the burden of proof when a confession is attacked, the issue no longer existed after *Miranda*, because there is no doubt that *Miranda* requires the State to lay a foundation of voluntariness before it can use a confession. This can only be done by first showing that the *Miranda* warnings were given meaningfully and that if the protections warned of were waived, that the waiver was done so intelligently.

Since the burden of proving the defendant guilty beyond a reasonable doubt is always the duty of the State, no less can be required for the proof of an allegedly voluntary

confession, certainly as damaging as any evidence can be. *Miranda*, by placing on the State the burden of proving a confession voluntary, laid down no new rules of law, but merely made clear what the burden of proof always was in confession cases, at least when the voluntariness of the same was attacked by the defendant. That such a burden is on the prosecution can best be shown by the words of *Miranda* itself at 384 U. S. 479:

> "But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

It is well established in Illinois that when the voluntary nature of a confession is brought into question by a motion to suppress, it is the duty of the State to produce all material witnesses connected with the taking of the statements or explain their absence. *People* v. *Wright*, 34 Ill. 2d 88; *People* v. *Dale*, 20 Ill. 2d 532; *People* v. *Sloss*, 412 Ill. 61; *People* v. *Banks*, 26 Ill. 2d 259.

Mr. Justice Schaefer in his dissent in the case at bar held in the very last paragraph of that dissent:

> "The burden was upon the prosecution to establish the voluntariness of the confession by a preponderance of the evidence. (*People* v. *Harper*, 36 Ill. 2d 398, 402; *People* v. *McGuire*, 35 Ill. 2d 219; *People* v. *Tomlinson*, 400 Ill. 555, 561). In my opinion the prosecution failed to meet that burden and the admission of the defendant's confession violated his constitutional rights." 39 Ill. 2d 489, 520.

That Justice Schaefer is correct is borne out by the fact the State did not call any witnesses at all to rebut the psy-

chological and psychiatric testimony presented by the petitioner, nor did the State present any evidence that he was capable of giving a credible and trustworthy confession, an issue which arose as a result of not only the testimony presented by petitioner, but also per se from the age and lack of intelligence on the part of the petitioner.

Only those witnesses who could testify as to how the confession was taken were called—almost all of whom were police officers. In fact all the State presented on its case in chief at the pre-trial hearing of the petition to suppress the confession was the testimony of Donald Flannery, the Court reporter who transcribed the written confession, and of Harold Thomas, a Chicago Police Department youth officer who was present at 4:00 P.M. for the oral confession. [R. 284-428]. Thomas was never present at the taking of the written confession and Flannery was not present at its signing [People Ex. 30, R. 1987, 2002-2003]. The other officers who interrogated Hester plus the assistant State's Attorney who took the written confession were called only in rebuttal. After Flannery and Thomas testified the state rested. [R. 426-427]. This was not even enough for a prima facie case and was violative of Illinois' own rule requiring the State to call all material witnesses connected with the taking of the statements from the defendant. Certainly, Garippo, the assistant state's attorney was important, as was Sergeant Keating who was a witness to the written confession.

Defense counsel called this to the Court's attention by moving to suppress the confession because the defendant did not voluntarily sign People's Exhibit 30 [R. 426-427] and by moving ". . . that the confession be suppressed on the grounds that the State has failed to sustain their burden of proof that the confession was voluntary." [R. 428].

It is reprehensible that the Court held that these two witnesses (out of the at least six that directly took part in extracting a confession from Hester) made out a prima facie case for the State [R. 428]. This method of holding a hearing on the motion to suppress the confession was used with one purpose in mind, namely, to allow all of the prosecution witnesses to sit in the Courtroom and make sure they all got their stories straight. In order to prevent this defense counsel repeatedly moved to exclude witnesses from the Courtroom until it was their turn to testify, the trial Court ruling that rebuttal witnesses could sit in the Courtroom [R. 322, 323, 428]. Naturally, the prosecution thereafter used all of the other witnesses on the petition to suppress as "rebuttal witnesses", as thirteen of these witnesses were so called [R. 618, 637, 669, 675, 678, 685, 689, 696, 726, 837, 846, 926, 966]. [For a complete listing of State rebuttal witnesses on petition to suppress purported confessions see index to black bound 861 page abstract of record, designated as item 11 in brown bound record in Supreme Court of Illinois].

To permit such procedure was reprehensible in that it completely frustrated the efforts of the petitioner to have the State's witnesses testify from their own recollection and not what they heard from the lips of the previous witnesses, a procedure approved of by the trial Court simply by calling a witness a rebuttal witness even though there was never any question that most of these witnesses, if not all of them, were vital to the State's maintaining its burden of proof.

Credence must be given to the petitioner's testimony that he could go home if he "confessed" and that unless he told the officers what they wanted to hear the two white

officers were going to throw his head through a wall. [R. 485-487, 2377]. The promise to go home would be an inducement at least for a child so stupid as Hester and the threat to throw his head through a wall would terrify an adult.

Therefore, even if applying the conventional pre-*Miranda*, *Escobedo*, and *Gault* standards, the totality of the circumstances rule applicable to all confession cases requires Hester's confession to be ruled inadmissible. There is no way that a confession taken from an ignorant and illiterate 14 year old boy with a mentality not too far removed from kindergarten can be compressed into a package small enough to fit within the boundaries that define due process.

In Illinois, and in every other State of the Union, there are prohibitions, either statutory or by historical precedent, precluding individuals under a certain age from engaging in certain activities or conduct. A minor's contracts are made voidable because the law acknowledges that a minor is usually incapable of exercising good business sense; his marriage before age 21 requires parental consent in most states; in almost every State of the Union he must be 21 to vote (where voting is permitted earlier, it is required that the voter be at least 18); valid wills can be executed only by persons of a certain age or more (in Illinois one must be at least 18 to devise the real and personal estate which he has at the time of his death, thus recognizing that one under 18 does not have the capacity to exercise depositive intent or to sufficiently know the natural objects of his bounty); in many States one cannot be licensed to drive an automobile until he is 18 (in some

States 16); and most States make it unlawful to sell alcoholic beverages to persons less than 21 years of age.

Even the enlistment in the military service of one under 17 years of age is void, thus requiring the enlistee to be summarily released from the service. It is apparent that the law has always felt, and still does, that prior to adulthood individuals are incapable of competently engaging in certain activities, not only for the protection of those with whom they deal and society at large, but to protect youth as a whole from the consequences of their own conduct. It is therefore shocking that Illinois (and her sister States) places greater reliance on the confessions of children than it does on their ability to contract, to vote, to make a will, to marry, drive an auto, purchase liquor or serve in the armed forces. Nowhere in the United States is a 14 year old permitted to engage in these activities. Should less be required of him to support his incarceration in a state prison for 55 years?

I(b).

The Taking of Confessions From Young Children Is by Its Very Nature So Repugnant to Due Process That Such Confessions Must by Their Very Nature Be Deemed Inadmissible and the Rule of Exclusion Applied to the Same.

The taking of confessions from children must be abolished at least where use thereof can be made in a criminal trial, a reality which cannot bear fruition without application of the rule of exclusion.

If this Court permits the continued taking of confessions from children, then, it necessarily follows that *Miranda*

type warnings will have to be given the children, presupposing that children can make a knowing and intelligent waiver of their right to silence and to counsel, a conclusion which a reasonable man's knowledge of the average child does not support.

Any such warnings cannot therefore be adequately comprehended by the vast majority of children, thus rendering the giving of such warnings a useless act, regardless of how meticulous the police are in giving the child his required warnings.

As was said in the majority opinion in the *Gault* case at 387 U. S. 1, 44, "Specifically the question is whether in such a proceeding an admission by the juvenile may be used against him in the absence of clear and unequivocal evidence that the admission was made with knowledge that he was not obliged to speak and not penalized for remaining silent. In light of *Miranda* v. *Arizona*, 384 U. S. 436, we must also consider whether, if the privilege against self-incrimination is available, it can effectively be waived unless counsel is present or the right to counsel has been waived."

This Court went on to say at page 50 of 387 U. S. that "Further, authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." See also *In the Matters of Gregory W. and Gerald S.*, 19 N. Y. 2d 55, 224 N. E. 2d 102, where Judge Keating of the New York Court of Appeals held the confessions of two 12 year old Negro boys inadmissible. A psychiatrist testified that one of the boys would admit "whatever he thought was expected so that he could get out of the immediate situation." Both confessions were in specific detail and contained various inconsistencies.

A warning to one who is not capable of meaningfully comprehending the warning is the same as no warning at all, which is the result obtained where *Miranda* warnings are given to a child. The adult who receives the *Miranda* warning is thus given greater protection than a mere child, for the adult (unless mentally deficient to an extent sufficient to negate a knowing and intelligent waiver) who is properly advised of his rights pursuant to *Miranda* will then receive an effective warning, whereas the child who receives a warning he cannot comprehend actually receives no warning at all. We are therefore left with an adequately warned adult and an unwarned child, an inequality that the status of being a juvenile should not give continued life to. (See *Application of Gault*, 387 U. S. 1, 28).

"This Court has emphasized that admissions and confessions of juveniles require special caution." *Application of Gault*, 387 U. S. 1, 45. "With respect to juveniles, both common observation and expert opinion emphasize that the 'distrust of confessions made in certain situations to which Dean Wigmore referred in . . . 387 U. S. at 44-45 . . . is imperative in the case of children from an early age through adolescence." (See 387 U. S. at 47).

The New York Family Court Act (Sect. 724(a)) provides that the police must attempt to communicate with the juvenile's parents before questioning him, and that absent special circumstances a confession may not be obtained from a child prior to notifying his parents or relatives and releasing the child either to them or to the Family Court. (See *In the Matter of Addison*, 20 App. Div. 2d 90, 245 N. Y. S. 2d 243).

Dean Wigmore, in discussing confessions, states:

"The ground of distrust of confessions made in certain situations is, in a rough and indefinite way, judicial experience.' There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported . . . but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgement of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence . . . The principle, then, upon which a confession may be excluded is that it is, under certain conditions testimonially untrustworthy. . . . " (See 3 Wigmore Evidence Sect. 822 (3d ed. 1945).

It is claimed on behalf of the petitioner here that the confessions of children of similar station to the petitioner here are not other than nontrustworthy. The law should not engage in the hypocrisy of attempting to transform these utterances into believable admissions upon which the conviction of a serious crime can be based. That which is untrustworthy by its very nature cannot easily (if at all) be accorded necessary verity. The best procedure is to exclude the confessions of children merely because they come from children, without attempting to provide "adequate safeguards."

Judge Ketcham of the Juvenile Court of the District of Columbia said in rejecting the oral statements made at police headquarters by four juveniles charged with assault and attempted robbery that "Simply stated, the Court's decision in this case rests upon the considered opinion—after nearly four busy years on the Juvenile Court bench during which the testimony of thousands of such juveniles has been heard—that the statements of adolescents under 18 years of age who are arrested and charged with violations of law are frequently untrustworthy and often distort the truth." (*In the Matter of Four Youths*, Nos. 28-776-J, 28-778-J, 28-783-J, 28-859-J, Juvenile Court of the District of Columbia, April 7, 1961).

Your Honors are asked to face this question squarely, whether this Court will permit the continued use in evidence of confessions from children, especially where these confessions can be used in a criminal trial? To hold that such can continue is to conclude that there is little difference between taking a confession from an adult or a child, the error of such a statement being only too obvious. There is a difference—in age, experience, maturity, thinking and the total awareness of the facts of life that only the adding of years to one's life can give.

If this Court is not prepared to apply the exclusionary rule to confessions taken from children because they are children (which is preferable to any other alternative), then this Court is earnestly requested to hold once and for all that special safeguards must surround the child whose confession is being taken from him in order to supply to the fullest extent possible that degree of equality that due process requires be granted to juveniles when comparing

the due process given to a child with that the law requires be given to an adult.

Most appropriate is another reference to *Gault*, at page 55 of 387 U. S. where the Court said that:

> "We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, juvenile courts and appellate tribunals in administering the privilege. If counsel is not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it has not been coerced or suggested, but also that it is not the product of ignorance of rights or of adolescent fantasy, fright or despair."

I(c).

The Detention of This Petitioner Was Unlawful. The McNabb-Mallory Rule Should Be Applied, at Least in the Fact Situation Here, to State Court Convictions Not Only as a Rule of Federal Procedure but Also as a Rule of Federal Constitutional Law Applicable to the Individual States of the Union.

The very detention of the petitioner here was designed solely for the purpose of securing a confession. His arrest at 8:00 A.M. permitted the police to take him before a judge or magistrate without any difficulty. The day of arrest was a Friday and not a holiday, the courts being open and functioning. In fact, Illinois law provded that "When an arrest is made without a warrant, either by an officer or a private person, the person arrested shall, without unnecessary delay, be taken before the nearest magistrate in the county, who will hear the case, for examination, and the prisoner shall be examined and dealt with as in cases of arrests upon warrant." (Chap. 38 Ill. Rev. Stats. 1959, Sect. 660). It cannot be too often repeated or too greatly emphasized that the petitioner was not taken before any court or judicial officer from his arrest on April 21, 1961, until his arraignment on May 5, 1961.

Rule 5(a) of the Federal Rules of Criminal Procedure, as effectuated in *McNabb* v. *United States*, 318 U. S. 332, and *Mallory* v. *United States*, 354 U. S. 449, is so basically related to in custody interrogation that Rule 5(a) is now in effect a rule of constitutional law and not just a rule of federal procedure. The mere detention of this 14 year old petitioner was unlawful and so effects the issue of the voluntariness of his confessions that the same must be

presumed involuntary. At least the prosecution failed to sustain its burden of proving that it was not so, as Mr. Justice Schaefer stated in his well reasoned dissent. Application of this rule also requires suppression of the physical evidence taken from the petitioner during such detention. See *U. S.* v. *Middleton*, 344 F. 2d 78; *U. S.* v. *Klapholz*, 230 F. 2d 494, cert. den. 351 U. S. 924. In speaking of Rule 5(a) in the *Miranda* case, this Court stated that "These supervisory rules, requiring production of an arrested person before a commissioner 'without unnecessary delay' and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States." *Miranda* v. *Arizona*, 384 U. S. 436, 463.

To unlawfully detain this petitioner without taking him before a court for two weeks requires the conclusion that his confessions were given in "the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak." 384 U. S. at p. 465.

To be candid, it is true that federal procedure can provide greater procedural protection for those accused of crime than do the individual States, and as long as the States provide at least what is defined as minimum due process there can be no real controversy over the existence of a greater degree of procedural protection in the federal Courts. However, what procedural protections are required of the States to satisfy procedural due process is most often best determined by examining the abuses on a case by case basis, after which it can often be concluded that the particular abuse violates due process requirements. If

such is the case, then due process can only be satisfied by eradicating the abuse.

Therefore, the petitioner contends that Rule 5(a) of the Federal Rules of Criminal Procedure merely codifies prohibitions against an abuse which, even absent said rule, experience teaches are nevertheless violations of procedural due process. The rule merely makes explicit by statute that which needed no statute in the first place to justify its existence. The Rule did not broaden procedural due process or create greater protections than constitutionally required, but merely defined what had always existed.

There can be no excuse for failing to take a suspect before an examining magistrate "without unnecessary delay." Failure to do so gives rise to a presumption of evil, the approval of which can serve only to permit the police authorities to make their own determination of how long a defendant must remain in custody before charges are preferred against him. Even those most sympathetic to the difficulties of law enforcement officers can find little complaint with a rule requiring a suspect to be speedily taken before a judicial officer.

Illinois had a statute applicable to the petitioner and similar to Federal Rule 5(a), namely, Sect. 660 of the Illinois Criminal Code (now Chap. 38, Sect. 109-1, Ill., Rev. Stats., enacted August 14, 1963), which also provided that one arrested without a warrant must be taken before the nearest magistrate without unnecessary delay. Certainly holding a 14 year old fifth grade boy for 14 days without so doing is per se a violation of Illinois' own statute. It is disgusting that the Illinois Supreme Court pays no attention to said statute and ignores it as if it were never en-

acted. No good at all is served by having a clear and simple statutory directive when the highest Court in the State says in considering the applicability of Sect. 660 to a confession from a suspect held incommunicado for three days that "... noncompliance therewith does not necessarily obviate a conviction nor render an otherwise voluntary confession inadmissible at the trial. (See *People* v. *Hall*, 413 Ill. 615, 110 N. E. 2d 249). The *McNabb-Mallory* rule (*McNabb* v. *United States*, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819, *Mallory* v. *United States*, 354 U. S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479) holding confessions per se inadmissible if obtained during illegal detention, has never been the law of Illinois." (Citing *People* v. *Kees*, 32 Ill. 2d 299; *People* v. *Stacy*, 25 Ill. 2d 258; *People* v. *Jackson*, 23 Ill. 2d 274). This is nothing to brag about.

The reason for Rule 5(a) is to abolish unlawful detention. See *United States* v. *Carignan*, 342 U. S. 36. The purpose of the rule is to check resort by officers to secret interrogation of persons accused of crime, *Upshaw* v. *United States*, 335 U. S. 410 and to avoid all the evil implications of secret interrogation of persons accused of crime, the enforcement of this rule requiring the exclusion of not only statements made by the accused but also evidence obtained as a fruit of information obtained from accused (See *Wise* v. *United States*, 383 F. 2d 206), thereby precluding the state from benefiting from its own lawlessness.

The evil growing from unlawful detention is self-evident. Certainly an accused cannot be held incommunicado without charges forever. Can he be held one century? Ten years? One year? One month? One week? There is a point at which all men can conclude that detention is unreasonable and illegal. It is likewise true that unlawful detention

can in and of itself be a violation of due process without any statutory proscription (for example, holding a suspect incommunicado for two months without being taken before a magistrate during which time his confession is extracted).

The petitioner, who was not taken before a judicial officer until 14 days after his arrest, therefore had his right to due process violated, and asks this Honorable Court to find that at least where a child is concerned, the failure to take the child before an examining magistrate without unnecessary delay (if not immediately) is violative of due process. Only because the petitioner was held incommunicado was a confession obtained from an innocent almost illiterate child to that which he did not do. Only by finding that the failure to take a suspect before an examining magistrate without unnecessary delay is a due process violation can prevent the repetition of such an occurrence. The States, including Illinois, have respect for only one rule, the rule of exclusion, as in *Mapp* v. *Ohio*, 367 U. S. 643 and *Mallory* v. *Hogan*, 378 U. S. 1. At the very least, *McNabb-Mallory* should be extended to the States where the detention of children for criminal charges is concerned, or where such charges may result. The child should be brought immediately before the magistrate.

The States give lip-service to the proscription against self-incrimination while doing violence to the pervading principle of that proscription; they keep the word of promise to the ear of the illegally detained and break it to their hope (*Griffin* v. *Illinois*, 351 U. S. 12, 24, concurring opinion of Mr. Justice Frankfurter).

I(d).

The Petitioner Is an Innocent Boy. A De Novo Examination of the Record Must Be Made Concerning Guilt or Innocence, Which Will Establish Not Only That the Confessions Are Untrustworthy, Unreliable and Incredible but Also Involuntary, for the Petitioner Confessed to That Which He Could Not and Did Not Do.

A. *Deficiencies in physical evidence.* The evidence, apart from the incredible and coerced confessions obtained from the defendant, fell far short of proving him guilty of murder beyond all reasonable doubt or to any other extent.

Aside from the confessions, the prosecution relied on a lipstick stain on the defendant's jacket [Peo. Ex. 3, R. 1630-1631, 1638-1639, 2082] [Peo. Ex. 14, R. 1578, 2085, 2086], a hair on his jacket [Peo. Ex. 25, R. 1644-1645, 1646], blood spots on his trousers [Peo. Ex. 15, R. 1579, 1633-1634, 2086-2087], a blood spot on his underwear [Peo. Ex. 16, R. 1580-1581, 1632-1633, 2087] and what the prosecution calls metal fragments from his jacket pocket and the inside back waistband of Mrs. Keane's panties [Peo. Ex. 23, R. 1625-1626, 1635-1636, 1772-1773] [Peo. Ex. 28, R. 1635-1636, 1768-1770, 1744] [Peo. Ex. 29, R. 1769-1773] [R. 1777-1789 for direct examination of Officer Principe, Crime Lab technician, as to Peo. Exs. 23, 28, 29]. All of these things taken together may at first blush seem overwhelming, but when they are separated piece by piece, the totality of their presence belies their belief.

It is beyond imagination to comprehend the lengths the prosecution went to secure the defendant's conviction. The lipstick stain on the exceedingly dirty jacket could have

come from anywhere. On cross-examination patrolman Principe from the crime lab testified that he could not say the lipstick stain on Hester's jacket was the same as the lipstick found in Mrs. Keane's purse, that he could not tell how long the stain was on the jacket, that he never broke down the chemical components of the lipstick in Mrs. Keane's purse and that he never wrote to the manufacturer of the lipstick (it was from Fuller Brush Co.) for the chemical components of the lipstick [R. 1865-1869]. The officer's testimony on direct examination that the faint lipstick stain on Hester's jacket was "most similar" to the lipstick tube in Mrs. Keane's purse [R. 1753-1767] was an unconscionable attempt to mislead the jury, who undoubtedly were misled by such testimony. Any lipstick in the world would have been "most similar". The prosecution knew there was no way to match the lipsticks so it used the deceitful approach of having Principe testify that they were most similar. Also, Hester did not wear his jacket until he went home a few minutes before 12:00 Noon precluding him from acquiring any stains in the bookroom. [R. 1293, 1323, 1324, 1361, 2406-2410, 2410, 2461].

It is ludicrous to believe that Hester could have received a lipstick stain on his jacket from Mrs. Keane without any bloodstains thereon. An examination of Defense Exhibit No. 7, a picture of the deceased's body, showing blood on Mrs. Keane's body, will dispel such an idea. [Def. Ex. No. 7, R. 1536, 2804]. The lipstick could have come from anywhere, even from hugging his own mother. An examination of this jacket (People's Exhibit No. 14) by this Court will support these contentions of the defense. (The prosecution presented no evidence at all as to the type, if any, of lipstick on Mrs. Keane's lips at the time her body was found, a sample of which could have been taken from her lips.

The autopsy was on the day of Hester's interrogation, when he was told of lipstick stains).

As to the bloodstains, patrolman Principe testified he typed a bloodstain on the left leg of the defendant's underwear and found it to be Type A, the same type as Mrs. Keane. This is unbelievable, as this spot on Hester's underwear was really his own blood. The defendant sleeps in the same underwear he wears all day [R. 2357-2358]. An examination of it will disclose it's utter filth. The spot of blood is up a good deal from the bottom of the underwear (which is ankle length). There was not a corresponding blood spot on the left trouser leg. Hester could have received this spot from Mrs. Keane only by completely taking his trousers off, if it is true he laid on top of her, (an unbelievable factual conclusion to make) but the blood on her is on the upper half of her body (Defense Exhibit No. 7), not the lower half. It is therefore inconceivable that any blood spot on Hester's underwear could have been from Mrs. Keane.

As to the blood stains on the defendant's trousers, only a visual inspection of the same will disclose the exceedingly small size of the few stains thereon, the stain in the groin area and the stain on the trouser cuff. These stains come from chopping wood with an axe [Def. Ex. 19, R. 2353-2354, 2805] with a splintered handle, which caused the defendant to injure his left hand [R. 1174-1176, 2346-2355, 2391]. Principe testified that this blood also was Type A.

The blood testimony is unbelievable because not only were the garments tested so contaminated as to preclude a proper test thereof, the tests were run in an incorrect manner and with no guarantee of scientific accuracy. The testimony of Dr. Alexander Wiener, whose credentials are

unimpeachable and who himself viewed the defendant's clothing [R. 2637], cannot be cast aside by the application of the usual rule concerning the jury's opportunity to hear two conflicting witnesses. Principe did not run his tests correctly. He ran the wet blood test first [R. 2526-2528] so that he would know Mrs. Keane's blood type and thus forever destroying his chance for objectivity in testing the dried stains. He knew her blood type as A and he was then bent upon finding A on the defendant's clothing. That is why the prosecution objected to questions by defense counsel as to which tests were run first, the wet blood or the dry stains, when the defense called Principe as their own witness. [R. 2526-2528]. The court repeatedly sustained these objections. The testing of wet blood last and the stains first is called the blind technique, namely, that the dried stains are tested blind—without the psychological prod of knowing what type the wet blood was. [R. 2670-2673].

In addition, Principe ran his control test too far from the stain, thus destroying the possibility of determining the existence of contaminants [R. 2671-2673]. The control should be run immediately adjacent to the stain [R. 2674-2676]. Principe ran his far away from the stain [R. 1837-1840]. This is an improper control because common sense teaches us that when you run a control as far away as possible on the particular garment that is no different than running the control on a completely different garment, which would give no information as to the possible contamination of the garment in question. For instance, testing a stain on Hester's trousers, and an area on one of the juror's shirts is used as a control. This gives no scientific verity. Likewise, a test for control purposes on Hester's trousers run far from the stain itself gives no scientific

reliability. The control is simply for the purpose of testing for contamination factors (dirt, sweat, etc.), so, therefore, if you run the control close to the stain, you then have a much greater chance of the same factors (and contamination, if any) affecting the control, as affecting the stain. This is not so when the control is run far from the stain, since there is a substantial possibility of part of one's trousers not being affected by factors present in another part. Certainly, one must admit there is more sweat, dirt and other contaminants in the groin, crotch, seat and cuff areas than other parts of one's trousers. Even Principe admitted the effects of contamination on reliable blood-stain test results [R. 1839-1841]. Dr. Wiener stated that the control should be run close to the stain, and if the prosecution would not have objected to the elicitation of this testimony and had not received their usual support from the trial judge, the jury could have better understood this technical subject [R. 2671-2673]. Principe admitted his lack of knowledge concerning contaminants when he said "Actually, I have never conducted a test to see what interferes with typing." [R. 1841].

In addition, Principe read the results of his tests incorrectly and should have concluded he found Type O, the defendant's own blood type, and not type A. The testimony of Dr. Wiener is proof of the fact that Principe not only ran his tests incorrectly, but read his results wrong [R. 2642-2661]. Dr. Wiener explained the proper way to type a dried blood stain [R. 2661-2667] and the difficulties in typing such a stain and a wet stain [R. 2665-2671]. On cross examination of Dr. Wiener by the state a complete discourse of Principe's errors is given [R. 2699-2707], which so thoroughly refutes Principe's tests that the same have no reliability.

Principe adjusted his Anti-A and Anti-B typing sera to "agglutinate in eight minutes" when testing the stain on Hester's garments. On the A side there was clumping 28 minutes later, which Principe admitted [R. 1853]. A type blood is the absence of Anti-A agglutinin and conversely the presence of Anti-A indicates the absence of A. If A and Anti-A were mixed together they would clump, which even Principe admitted [R. 1853]. Dr. Wiener gave a complete explanation of the four basic blood types and their Anti-bodies (A, B, AB, O and Anti-A and Anti-B) [R. 2635-2636]. Therefore, when Principe noticed clumping [R. 1853], this indicated the absence of A rather than its presence, because if A is present then Anti-A cannot be present (B blood contains Anti-A and A blood contains Anti-B. Clumping indicates lack of absorption, which means that which you seek to have absorbed is different than the factor you try to have do the absorbing). Therefore, when known A blood cells were added to the stain [R. 1851-1853] and then clumped, this indicated the presence of Anti-A in the stain, which is the absence of A. Likewise, when the B side clumped [R. 1853-1855] this indicated the presence of Anti-B in the stain, which is the absence of B. The absence of A and the absence of B means that the stain was type O, AND NOT TYPE A.

Now, since clumping took place on the A side $3\frac{1}{2}$ times longer than adjusted for [8 minutes against 28 minutes R. 1853-1855] and twice as long on the B side [8 minutes against 15 minutes R. 1853-1855], even if we conclude there was absorption on both the A and B side, and if the absorption is a true indicator of the presence of the blood type of the absorbed cell, then the correct reading would be blood type AB and not A, since the absorption of both

A and B indicates the presence of A blood and B blood. But, Josephine Keane was Type A and not AB. However, the fact that there was clumping, even if delayed, indicates that there was no absorption, hence the absence of A and the absence of B, and therefore the presence of O, but Hester was Type O, so that any stains on him were his own, and there is nothing unusual about having his own blood type on him.

Dr. Victor Levine, the state's own witness, who typed the defendant's blood at the request of defense counsel, supports the inaccuracy of Principe's testing as outlined above, when he testified as follows [R. 2072-2078]:[5]

> "Q. Now, what tests did you perform to determine the type?
>
> A. You mean the O-A-B type?
>
> Q. Yes. What tests did you use?
>
> A. I used the standard routine tests used everywhere. I tested the blood cells of the person against anti-A and anti-B typing serum.
>
> Q. Will you tell the ladies and gentlemen of the jury how you performed the test?
>
> A. Well, red blood cells are taken and put on a slide and previously purchased typing serum is also taken and put on the slide; that is done twice, once with anti-A typing serum and once with anti-B typing serum.

[5] Dr. Levine discussed the typing of whole wet blood, in which if clumping appears after Anti-A and Anti-B are added, we then Type AB blood (A repels Anti-A by clumping and B repels Anti-B by clumping). In a dried stain, the test is not so easy, so that when Principe added known A and known B to the stain and there was clumping, there was therefore known A being repelled (not absorbed) and known B being repelled (not absorbed) indicating the stain was Type O (an absence of A and an absence of B).

And the two are mixed, that is, the cells and serum are mixed, and the test is observed to see whether or not there is any clumping on the slide.

Q. Now, Doctor, if you were to find "A" blood, tell us what would clump and what would not clump?

A. Well the mixture of cells and anti-A typing serum would clump with type A blood.

Q. How about type "B" blood?

A. The mixture of cells and anti-B typing serum would clump with type "B" blood.

Q. What if you ran a test and both of them clumped? What would you have then?

A. If both of them clumped, the person would be type "A-B".

Q. In other words, in running a test with anti-A having clumped and then running a test with anti-B and having it clump, would you then come up with type "A-B" blood?

A. If both of them clumped, it would be type "A-B" blood, that's right.

* * * * *

Q. Is there a difference, Doctor, if you know, between typing wet blood and typing a dried stain?

A. Yes, there is a difference.

Q. Tell us what the difference is.

A. Well, with a dried stain, the blood has to be suspended in some solution before it can be typed.

Q. Is this as simple a test as the one on a wet stain?

A. No, it is—

Mr. Stamos: Objection, Your Honor.

The Court: I will let it stand.

The Witness: It is a more complicated test."

It is small wonder therefore that when one of the prosecutors answered the defense argument in the hearing on the motion for new trial he admitted that the blood was the least conclusive of prosecution evidence [R. 3210].

A scientific hoax was therefore perpetrated by Principe's testimony and undoubtedly contributed in great measure to the conviction of an innocent boy. The Court was, therefore, in error when it did not strike patrolman Principe's testimony when the defense moved to do so [R. 2090-2092].

As to the hair on Hester's jacket which Principe testified he found human blood on but could not type for lack of sufficient quantity of blood [R. 1746-1749], one must ask himself the question of how the hair stayed on the jacket from 10:00 A.M. on April 20, 1961 to 11:00 A.M. on April 21, 1961, without falling off and without leaving a corresponding bloodstain on the jacket at the spot where the hair allegedly was. Sergeant Hazen, while under cross examination, admitted the absence of such a stain [R. 1677-1678]. Hester's clothes were taken by officers Perkins and Thomas to the crime lab in a shopping bag [R. 1581-1582]. It is plainly impossible that if there was a hair on the jacket it would have adhered to it while bunched together with the other clothing, and if it had so adhered, why was there not a bloodstain on the jacket from this "bloody" hair. If there was a hair, it could have come from anywhere, maybe even the bag itself, or, could it not have come from the crime lab itself staining a falling hair from one of its own personnel while the examinations and tests were being made, at which time blood typing serum was being used.

The bombardment of metal particles from the deceased's panties in order to support the contention that the

defendant killed Mrs. Keane is a fantasy. How on earth could a particle leave the defendant's pockets and wind up in the inside back waistband of Mrs. Keane's panties? This is what the State would have the jury believe. Sergeant Hazen testified he found a metal particle (the size of a tip of a ballpoint pen) [R. 1666-1667] in the inside back waistband of Mrs. Keane's panties [Peo. Ex. 6, R. 1625, 2083] and that he found metallic fragments in the defendant's jacket pockets [R. 1635-1636]. Principe testified that he tested the particle from the waistband and a particle from the defendant's jacket pocket by bombarding these particles with x ray diffraction [R. 1769-1789, 1867-1879] and that in his opinion the fragments were of the same origin. Mrs. Keane was found on her back with the crotch of her panties slit, but her panties were not pulled down and her skirt and slip and girdle were on. [R. 1392-1393, 1454, 1544-1545]. There was just no way for any particle to get into the "inside back waistband." [Def. Ex. 2, Picture of Mrs. Keane's body laying on back on floor, R. 1410]. Principe admitted that "as hard as we tried" he could not show any place where the two particles could have been one, that "we could not match this particle with any of the things as you would match something broken." [R. 1870-1871]. Principe also admitted that he did not chemically decompose those particles to ascertain their components. [R. 1871]. It is unbelievable that one would put his hand in his pockets and in the course of so doing causing a particle that is the size of a tip of a ballpoint pen to adhere and then reach under the victim and put a particle in the inside back waistband of the deceased's panties. If it was sex the real culprit was after, it was readily available from the front, especially after the panties were slit. It is interesting to note that Hester's written

"confession" (People's Exhibit No. 30) does not at all contain any fact that would in any way support the State's contention that the metal particle was deposited by the defendant. The only conclusion is that this particle was in the inside back waistband of the panties before Mrs. Keane was assaulted or the particles never were in the waistband. It must be remembered that the squadron driver who took Mrs. Keane's clothing to the crime lab including her undergarments stopped at a National Tea store for a cardboard box that he grouped the clothes together in, the coat and purse at the top and the rest of the clothes at the bottom. These boxes often have foreign particles in them that appear metallic—such as particles from the foil of a candy wrapper or the particles from the large metal staples that are often used to hold these boxes together. [R. 1551-1554]. Again, reference must be made to the State's and the Court's refusal to require production of Principe's notes and memoranda so that the defense could properly cross examine him. [R. 70-71, 1660, 1691-1696, 1826-1836, 1856-1857].

The testimony of the defendant's teacher cannot be disregarded. [R. 2403-2421]. She stated she had no recollection of Hester leaving the room from 10:00 A.M. to five or six minutes before noon. [R. 2410]. She said the same thing on cross examination. [R. 2414-2415]. Here is the eye witness to the defendant's whereabouts. She cannot be cast aside lightly.

B. *Inconsistencies Between Actual Facts and the Defendant's Oral and Written Confessions*

In the purported written confession by the defendant (People's Exhibit No. 30) he admits to doing things that

could not possibly have happened, thus rendering this "confession" incredible, and therefore inadmissible. People's Exhibit No. 30 discloses inconsistent, incredible and unbelievable admissions explained as follows:

1) To seeing Mrs. Keane in the bookroom at "two minutes after ten." The defendant was so entirely lacking in sophistication and sophistication that the truth of a statement such as "two minutes after ten" should immediately create doubt in the mind of one hearing or reading the same. All of the classmates of the defendant (four in all) who were called as prosecution witnesses testified that the milk cartons were taken down a good deal more than two minutes later than 10:00. This is important because the prosecution tries to place Hester out of his room to take the milk cartons down after recess. [R. 1275-1383].

2) That a friend of his was with him, who waited by the stairs while he (Hester) went into the bookroom. This is perhaps the most incredible point of all to believe, that one would go into a room to commit murder while another boy waited for him. Yet the boy referred to as waiting, Sherman Baker, was never called as a prosecution witness, but was called as a defense witness and testified that Hester did not take the milk cartons down with him on the day of Mrs. Keane's death (Thursday, April 20, 1961) and therefore did not wait at the stairs for Lee Arthur [R. 2442-2443]. The judge and the prosecution were evidently not too pleased with what 11 year old Sherman Baker told them, for they "coached" questioned him three times [R. 2439, 2444-2447]. One does not tell another to wait while he goes into a room to commit murder unless that other person is an accomplice or co-conspirator. Here Sherman Baker was

never ever accused of such, let alone was he ever charged with it.

3) Hester also stated in his written confession that he stuck the knife up his sleeve with a rubberband around it and that he tripped over some books and that the knife somehow then was in his fist and he stuck Mrs. Keane in the middle of the back and that she fell and he slipped back down and stuck her again in the back. These statements are unbelievable and absolutely contrary to the physical evidence presented by the prosecution's own witnesses. Dr. Wagner, the pathologist, definitely stated that Mrs. Keane had no stab wounds in the middle of the back. In fact, there were no stab wounds in the back as commonly termed by laymen. The doctor testified about four stab wounds in the right side, the lower rib cage on the right [R. 1457], which is an area commonly known as under the armpit. "confessing" to stabbing Mrs. Keane in the back is therefore unbelievable. At this point (page 5 of People's Exhibit No. 30) Mr. Garippo, the Assistant State's Attorney, asked Hester "Now when she turned over on her back, what did you do then?" Hester then answered with a question, "When she turned over on her back?" Nowhere previously in the "confession" was a mention made of "turning over on her back." Hester, by answering with a question, obviously did not know anything about Mrs. Keane turning over on her back.

The only way Mrs. Keane could have been stabbed where she was, was in the manner described by Dr. Joseph Campbell, the pathologist who testified for the defense. Dr. Campbell testified in response to a hypothetical question that the first blow had to have been struck in the chest, which is absolutely contrary to what Hester "confessed" to

[R. 2774-2778], because of the lack of aspiration of blood into the left lung [R. 2778-2779].

4) Hester "confessed" to stabbing Mrs. Keane "two times" in the breast. First of all, Mrs. Keane was stabbed three times in the chest (one of these was in the aorta). [R. 1457, 1480-1484]. Secondly, Hester was only at the most the equivalent of a second grade student (although physically he was in the fifth grade) and it is not likely he would use the word "breast".

5) Next Hester said he pulled up Mrs. Keane's dress and cut her garter belt, unzipped his pants and laid on her and cut her shorts and that his penis was out. If this actually happened, then Hester used the same knife with which Mrs. Keane was stabbed, the blade of which would have then been bloody. When the garter belt (or garter attachments to the girdle) were cut, the cut portions thereof would have been bloodstained. It is significant that the prosecution's own witness, Sergeant Hazen, the microanalyst from the crime lab, testified on cross-examination that there were no blood stains on the cut portions of Mrs. Keane's panties (shorts) or garter attachments, which should have been bloodstained if cut with a bloody knife. [R. 1663-1664, 1671-1672; Peo. Ex. 6 (Panties) R. 1662-1663, 2083; Peo. Ex. 9 (Girdle) R. 1671-1672, 2084]. An examination of these garments by this Court will reveal that there are no bloodstains immediately adjacent to each side of where the slits in the garter attachments and panties were made.

6) Hester then said he got up, cut her shorts and laid on Mrs. Keane a second time, that he squirted a little bit and that his penis was not inside her and that he laid on Mrs. Keane for two minutes. That is all impossible. If Hester squirted (if had an orgasm) and did not enter Mrs.

Keane's vagina, then there would have been seminal stains around Mrs. Keane's pubic area and near her thighs. Dr. Wagner, the pathologist for the state who made the autopsy, testified that there were no seminal stains around her pubic area or thighs. [R. 1479]. If he laid on Mrs. Keane and had an orgasm and did not enter Mrs. Keane's vagina, there would have been seminal stains on Hester's trousers near the fly area, but there were no such stains. Sergeant Hazen testified that there was no seminal stains at all on Hester's trousers. [R. 1701]. If Hester would have laid on Mrs. Keane for two minutes, it is impossible that the clothing on the upper portion of his body would have been free of bloodstains. Yet, this was the case. There is no doubt that Hester wore the same clothing on April 20, 1961, as the day of his arrest on April 21, 1961. All of his classmates and teachers and his mother [R. 2145-2147] testified to his wearing a red sweater, with a shirt underneath and khaki trousers. The garments were filthy and worn for a long continuous period of time without laundering, as an inspection of the same must reveal. The defense readily admits the defendant wore the same clothing on April 20, 1961 as on April 21, 1961. Certainly, the State does not deny this, or else it would not have introduced the defendant's clothing in evidence. [R. 1324].

Yet the sweater is free of blood. Officers Teller and Prunckle support this by their testimony on direct examination in the motion to suppress evidence. [R. 1186-1187]. An examination of this sweater by the Court will show that it is free of any blood. That is why the State never offered the sweater into evidence. It was the defense that offered the sweater into evidence, the same then being received [Def. Ex. 17 (same as Peo. Ex. 19 for identification not offered by State in evidence), R. 2268; 2270]. [R. 2087,

which shows the State starting to offer the red sweater into evidence, realizing their error and withdrawing the exhibit, never to again offer the same into evidence].

7) All of the defendant's classmates, both those who testified for the prosecution and those for the defense, and the defendant's teacher (Miss Webster), testified that Hester did not take his jacket from under the pulled down blackboards until he went home at shortly before noon. [R. 1293, 1323-1324, 1361, 2406, 2461]. He was then seen a very short time later in the schoolyard with other children when the morning school shift let out for the day. In fact, Ruth Becker, the assistant principal, testified that even though she saw Mrs. Keane at 9:30 A.M. in the first floor bookroom she never saw Hester at that time or any other time that day. This is significant since Miss Becker testified that she was in the close vicinity of that bookroom at 11:55 A.M. or 12:00 Noon. [R. 1413-1417]. The testimony of prosecution witnesses, Rosetta Harden and James Daniel, supports this. [R. 1327-1362]. Sergeant Hazen testified that he saw no bloodstains on Hester's jacket where the alleged bloodstained hair of Mrs. Keane was. [R. 1678-1679]. Also, no prosecution testimony whatsoever even intimated that the jacket was bloodstained. An examination of the jacket by this Court will reveal absolutely no blood on the jacket. If the "confession" is correct as to the offense taking place when the milk cartons were taken down at "two minutes after ten," then Hester could not have had his jacket on. If he had it on, it is impossible that it would be free of blood if he laid on Mrs. Keane's body for any length of time at all, let alone two minutes. It is not conceivable that Hester would have taken his jacket with him to throw out the milk cartons, since he returned to his room. That he was still in his schoolroom is not

questioned at all since the defendant was released a few minutes before the noon dismissal time [R. 2409], and the jacket was under the blackboards, which were pulled down and were not raised again until shortly before noon. [R. 2406-2410]. It would therefore not have been possible for the defendant to have worn his jacket during school hours, thus precluding any lipstick stain from Mrs. Keane. If the defendant did attack Mrs. Keane without his coat on, then there would have been bloodstains on the sweater, of which there were none, since the top half of her body had a good deal of blood on it. The only reason the State did not offer the sweater into evidence [R. 2087] was because of the absence of bloodstains thereon and this would have been very difficult indeed for the State to explain away. The sweater was never even given to patrolman Principe, the so-called police department blood expert for analysis. [R. 1815]. Of course not, there was nothing to analyze. That is why the State objected to questions put to Sergeant Hazen when he was called as a defense witness [R. 2566-2569] and asked about the sweater. These objections were sustained by the Court, which once again displayed its disregard for the defendant's right to present evidence. What could possibly have been improper about showing the lack of blood on his sweater?

These facts cannot be "explained" by the prosecution contending that Mrs. Keane was killed sometime around or after 12:00 Noon to justify the wearing of his coat by the defendant, since it is not conceivable that Mrs. Keane remained in the bookroom from 9:30 A.M. to 12:00 Noon without being seen. It will be recalled she was seen at about 9:30 A.M. in the bookroom by Ruth Becker, the assistant principal, and by Theresa Lawsche, a teacher in the

school. [R. 1389-1390; 2197-2199]. No one testified as to seeing Mrs. Keane after 9:30. It is not reasonable to suppose that if she were out of the bookroom at noon or thereafter that she would not have been seen. Had she been so seen, the prosecution certainly would have had the opportunity to put on a witness to this effect. At least, if there were such a witness, the prosecution would have been duty bound to call such a witness to testify.

Therefore, it is not possible that any lipstick or hair or metal particles or anything else supports the presence of the defendant at the time and at the scene of Mrs. Keane's death. In fact, Sergeant Hazen admitted that you cannot particularize hair, that you cannot tell whether it is from a male or a female or that it is from a particular person. [R. 1717-1720].

80 A great deal of sperm was found in Mrs. Keane's vagina. Dr. Wagner, the coroner's pathologist who performed the autopsy testified to this fact. At page 5 of his statement Hester was asked if his penis was inside Mrs. Keane and he replied no. Since the sperm was inside the vagina [R. 1511] and if there were no seminal stains around the pubic area of the deceased [R. 1479] the defendant could not have "squirted" as he said (at page 5). It would have been simple to type the sperm in Mrs. Keane's vagina [R. 1511] and there were no seminal stains around [2684-2686] and thereby determine from the sperm, without even testing blood, what the blood type was of the depositor of the sperm. Naturally, this test was not performed [R. 1729-1731], because it would have conclusively established the innocence of the defendant. When Principe was asked about typing sperm the court sustained an objection to the question [R. 1840]. This was another example of the in-

tentional effort by the State to preclude the defense from properly representing the defendant, and, it must be said, of the Court's frequent companionship to such efforts. When Officer Vitullo of the crime lab, who testified as to seminal stains on the defendant's underwear, was asked about typing semen, once again the prosecution objected when the relationship between blood type and semen was sought to be elicited. The Court sustained the objection because it exceeded the scope of direct examination [R. 1729-1730], which it most assuredly did not. This was a proper question to ask since the witness testified at length on direct as to his examination of seminal stains [R. 1722-1727], the relationship of the same to blood typing therefore being definitely within the scope of the direct examination. Also, the testimony of Vitullo that the seminal stain on Hester's underwear *"could have been"* 24 to 30 hours old was an obvious example of an answer to a prepared question designed to introduce evidence to conform to a "confession", since Dr. Wiener testified that once sperm dried you could not determine how old it was (it could be a day, a month or a year old) [R. 2683-2684], and there was no doubt the stain on Hester's underwear was dry.

9) At page six Hester said he was running and dropped the key, leading to the conclusion that the key must have been dropped near the bookroom, or at least in the school. However, no keys whatsoever were introduced in evidence by the prosecution. In fact, Officer Barre, who was assigned to search for evidence, testified that he looked for keys and a weapon at the school and found none at the school or in the vicinity thereof. [R. 1542] When asked how long he conducted his search, an objection by the State was sustained, the reason for so doing being difficult to comprehend.

hend. [R. 1542]. As to throwing the knife in a vacant lot across the street from his house, certainly one would have been found if one was there. It must be remembered that the search for the same was conducted shortly after Mrs. Keane was found dead. [R. 1541-1542].

101 The defendant's statement that he got the blood on him when he laid on top of Mrs. Keane is incredible. There was no blood on the top part of Hester's body. As to the bottom half of Mrs. Keane's body, there was no blood here. [R. 1454]. Dr. Wagner testified that her underclothing was absolutely clean [R. 1455], which would make it impossible for Hester to have received the small bloodstain on his crotch from laying on top of Mrs. Keane, thus lending great verity to the defendant's statement that this stain was caused by wiping his hand on his trousers after cutting the same on an axe handle. [Def. Ex. 19, R. 2352-2354, 2805].

111 The defendant stated (at page 7) that he tried to get a little blood off his underclothes and that he tried to wash the lipstick off of his jacket. The underclothes [defendant's longjohns, People's Ex. 16, R. 1580, 1581, 2087] had small staining on the lower left leg. [R. 1633]. Since there were no bloodstains on the lower half of Mrs. Keane's body, it is not conceivable that Hester could have any blood on him from the lower half of her body, preventing any credibility from being attached to the statement (on page 5) that the defendant laid on top of Mrs. Keane with his zipper open and his penis out. Even if this were true, how could this cause a bloodstain on the leg of longjohn underwear? Sergeant Haron, the microanalyst of the crime lab, testified that there was no evidence of washing anything off of either the defendant's longjohns [R. 1685] or

his jacket [R. 1678]. An examination of both articles by this Court (People's Ex. Nos. 14 and 16) will show that no attempt was made at washing or in any other way removing the stains thereon. If there had been such evidence, it most assuredly would have been introduced into evidence by the prosecution.

Inconsistencies between physical facts and what is "confessed" are significant factors in determining the voluntariness and credibility of a confession. Admitting what could not happen is the same as admitting nothing. Could one believe Hester if he confessed to killing Lincoln? To attempting to shoot Roosevelt? To assassinating McKinley? Certainly not. See *In Matter of W. and S.*, 49 N. Y. 2d 55, 277 N. Y. 512, 675, 224 N. E. 2d 102; *People v. Bishop*, 359 Ill. 142, 117-119.

The State knew it had to "put Hester in that bookroom sometime after 10:00 A.M." Every witness, both prosecution and defense, verified that he was in school, that he was in his room until recess at 10:00 A.M., that he was out of his room only a few moments for recess to go to the washroom. It is not conceivable that Hester would take the milk cartons down from the third to the first floor, tell another boy to wait for him, go in and kill Mrs. Keane, lay on top of her, have two orgasms, return to his room, sit in his assigned seat, have a dispute with another boy (whom he waited for in the schoolyard) shortly before noon, then go home as if nothing happened and then return to school the next day as usual without ever changing the clothes he wore the day before. Such conduct is too incredible to be believed.

Mrs. Keane died after 9:30 A.M. (Ruth Becker and Theresa Lawsche saw her about this time) and before noon

(as Dr. Wagner testified, R. 1453), leaving only 21/2 hours to account for. Hester was seen both shortly before noon by Miss Webster and Mr. Broyls, and after school shortly after noon by his classmates. That is why the State is so insistent that Hester went down with the milk cartons after recess, knowing that without establishing this time factor no conviction could be had. In addition, they must buttress an extorted and untrue confession that the defendant killed Mrs. Keane when he took the milk cartons down, along with the incredible statement that he told Sherman Baker to wait by the stairs while he entered the bookroom and that Sherman waited by the stairs while Hester was in the book room. This is ludicrous.

The physical evidence as it relates to the question of guilt and innocence, and the question of guilt and innocence itself, is therefore so closely related to the issues concerning the admissibility of the confessions that the guilt and innocence question and the questions concerning the confessions are not separable, and the discussion of the confessions cannot logically be conducted without reference to the question of guilt and innocence.

II.

The Protections Required in Juvenile Proceedings Pursuant to the Dictates of the Application of Gault, 387 U. S. 1, Must Be Applied Retroactively Here to Prevent the Taking of Secret and Incommunicado Confessions From Very Young Children With Severely Limited Intelligence.

In discussing the admissibility of 15 year old Gerald Gault's alleged confessions the Court held "that the constitutional privilege against self incrimination is applicable in the case of juveniles as it is with respect to adults" and commented on the taking of Gerald's confession outside the presence of his parents without advising him of his right to silence: *Application of Gault*, 387 U. S. 1, 56:

> "If counsel is not present for some permissible reason when an admission is obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it has not been coerced or suggested, but also that it is not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Application of Gault*, 387 U. S. 1, 55.

This is in line with Judge Ketchum's statement at page 55 of 387 U. S.:

> "... that the statements of adolescents under 18 years of age who are arrested and charged with violations of law are frequently untrustworthy and often distort the truth."

Since Gault's trial commenced on June 15, 1964, the rules laid down in *Miranda v. Arizona*, 384 U. S. 436, Illinois holds did not apply, but the prime issue was the necessity

of giving due process to juveniles and not merely providing safeguards to assure the giving of the protections required in *Miranda.*

Hester was actually under the jurisdiction of the Cook County Family Court (also known as the Juvenile Court), a delinquency petition against him having been filed in that Court less than 14 hours after his written confession [p. 10 of Ill. Sup. Ct. Record and Record of Family Court Proceedings, backed with a green backing and part of CLR]. The petitioner was not indicted in the Criminal Court of Cook County until one week later (April 28, 1961) [CLR 4, 5]. That Hester was indicted in an adult Court does not make his interrogation proper and his confessions admissible. The eliciting of the same was either proper or not when given. Whatever goes thereafter is of no moment. None of the safeguards required in *Gault* were given to the petitioner from the time of his arrest to the time of his written confession, certainly a critical stage of the proceedings.

The taint of the entire proceedings by the failure to provide the safeguards required by *Gault* is not the same as the promulgation of a new rule to provide additional safeguards to prevent an abuse already constitutionally frowned upon (such as *Miranda* rules providing safeguards against taking coerced confessions). Therefore, the *Gault* rule should be applied retroactively even though *Miranda* is applied only prospectively as required by *Johnson* v. *New Jersey,* 384 U. S. 719.

The protections required in juvenile proceedings must therefore apply throughout the entire proceedings, from arrest through final judgment and must be applied retroactively, as is the right to counsel in *Gideon* v. *Wainwright,*

372 U. S. 335, and the right to a transcript as in *Griffin* v. *Illinois*, 351 U. S. 12. In *McConnell* v. *Rhay*, —— U.S. ——, 21 L. Ed. 2d 2, 4, it was said that "This Court's decisions on a criminal defendant's right to counsel at trial, *Gideon* v. *Wainwright*, 372 U. S. 335, . . . , at certain arraignments, *Hamilton* v. *Alabama*, 368 U. S. 52, . . . and on appeal, *Douglas* v. *California*, 372 U. S. 53, . . . have been applied retroactively . . . the right being asserted relates to the very integrity of the fact finding process. *Linkletter* v. *Walker*, 381 U. S. 618, 639. . . ." See also *Arsenault* v. *Massachusetts*, —— U.S. ——, 21 L. Ed. 2d 5, making retroactive the right to counsel at a preliminary hearing where the defendant pleads guilty there.

Recently, in *Desist* v. *United States*, —— U. S. ——, 22 L. Ed. 2d 248, the Court reviewed the question of the retroactivity of a rule of constitutional law, discussing whether the rule should be applied to cases pending on appeal below as in *Linkletter* v. *Walker*, 381 U. S. 618 and *Tehan* v. *Shott*, 382 U. S. 406, or to a specific cut-off date consistent with the date of a particular decision (as in *Johnson* v. *New Jersey*, 384 U. S. 719, requiring application of the *Miranda* and *Escobedo* rules to trials commencing after the dates of those decisions).

Since the Constitution neither prohibits nor requires retrospective effect for decisions expounding new constitutional rules affecting criminal trials (*Linkletter* v. *Walker*, 381 U. S. 618, 629) there is likewise no impediment to applying retroactively constitutional rules concerning criminal trials. This must be done where the integrity of the fact finding process cannot be preserved but by a retroactive application of the constitutional rule involved.

The confession of a child cannot be trustworthy, at least, a child like the petitioner. Since this Court has applied retroactively the necessity of excluding an involuntary confession, *Jackson* v. *Denno*, 378 U. S. 368, this Court has therefore recognized that an involuntary confession is by its nature repugnant to the ideal that must be the object of all trials, namely, the elicitation of truth. The taking of a confession as was done from the petitioner here fits squarely into the category labeled INVOLUNTARY, the prohibition of which can be applied retroactively without conflicting in any way with the Court's application of the rule of retroactivity since at least *Linkletter* v. *Walker*, 381 U. S. 618.

This Court in *Stovall* v. *Denno*, 388 U. S. 293, 297, summarized three criteria guiding resolution of the question of retroactivity, namely, (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards.

(a) The purpose of applying *Gault* retroactively, at least to preclude the taking of confessions from children outside of the presence of counsel or parent, is to insure that the fact finding process that is a trial will to the fullest extent possible include only that testimony and other evidence that is trustworthy. This is unlike unlawfully seized evidence, which may be highly trustworthy, but nevertheless excluded because of the unlawful search by which it was secured.

(b) Since confessions taken from children are not worthy of belief, the extent of reliance by law enforcement authorities thereon can have no bearing. First, the law can-

not tolerate reliance on evidence that is not trustworthy. Second, since this Court has already held on innumerable occasions, that coerced confessions are not admissible in evidence, any rule excluding an untrustworthy confession can never properly be denied retroactivity even if law enforcement officials did rely on the admissibility of the same.

(c) The administration of justice can only be benefited by applying *Gault* retroactively so as to preclude the interrogation of children without precautions (such as *Miranda* requires, for example) to insure the trustworthiness of their utterances. The application of the *Gault* rules retroactively would serve only to assist those children behind bars whose convictions were secured from words extracted from their own mouths without any protections afforded them to insure the truth of those utterances, let alone providing standards concerning the future interrogation of children.

The majority opinion in *Gault* makes some references that are very pertinent to the case at bar. One (at 387 U.S. 49) quoted from *Standards for Juvenile and Family Courts, Children's Bureau Pub. No. 437—1966 (1966), pp. 47, 49,* which said that "Before being interviewed [by the police] the child and his parents should be informed of his right to have legal counsel present and to refuse to answer questions or be fingerprinted if he should so decide."

The other reference is to the *Report of the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" (1967), pp. 86-87,* where the Commission recommended that in order to assure procedural justice for the child, it is

necessary that "Counsel . . . be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent." (at 387 U.S. 38).

These two references indicate the thinking behind the *Gault* decision and its applicability also to those situations where the issues concern those critical stages of the proceedings prior to trial. There is no doubt that the letter and spirit of *Gault* is applicable to the post-arrest, pre-trial interrogation of a child, although the People of the State of Illinois will no doubt argue that *Gault* applies narrowly to the due process required during the juvenile trial proceedings itself and not to the post arrest interrogation of the accused, a position which is untenable.

The heart of the question therefore is whether the integrity of the fact finding process was undermined by the treatment of the petitioner and the taking of his incommunicado confessions. This cannot be answered other than in the affirmative, therefore permitting application of Footnote 22 of *Witherspoon* v. *Illinois*, 391 U. S. 510, 523, where this Court said ". . . But we think it clear, . . . , that the jury-selection standards employed here necessarily undermined "the very integrity of the . . . process that decided the petitioner's fate . . . and we have concluded that neither the reliance of law enforcement officials . . . nor the impact of a retroactive holding on the administration of justice . . . warrants a decision against the fully retroactive application of the holding we announce today." The due process for children required by *Gault* merits the same retroactivity.

See also *In the Matter of Whittington*, 391 U.S. 341, where the September 7, 1966 Ohio delinquency determina-

tion of a 14 year old boy who, while certiorari was pending, was bound over for trial as an adult. This Court per curiam, remanded the case for consideration in the light of *In Re Gault*, 387 U.S. 1. In the *Whittington* case the petitioner not only alleged due process protections but that certain statements made by him in response to questions by police officers were inadmissible. The remand of this case per curiam because of Gaullt is indicative of the fact that *Gault* principles are applicable to the in custody interrogation of children. The remand of *Whittington*, tried on or about September 7, 1966, and prior to this Court's decision in *Gault* indicates that *Gault* was treated here with retroactivity.

III(a).

Is a Defendant Accorded His Constitutional Right to Due Process and the Effective Assistance of Counsel Where the Psychiatrist Called to Testify in Behalf of the Accused Was Not Only Not Permitted to Testify as to His Examination of the Accused and What It Disclosed, but Also From Testifying as to Whether or Not the Defendant Was Susceptible to Psychological Coercion?

The defendant was denied due process and a fair trial by not being able to question his psychiatrist in any significant manner, thus making it impossible to prove that his confession was incredible and/or involuntary, making a nullity of the rule that a psychologically coerced confession is involuntary and inadmissible. See *Blackburn* v. *Alabama*, 361 U. S. 199, 207; *Culombe* v. *Connecticut*, 367 U. S. 568, 621. The petitioner was not permitted to ask the psychiatrist if in his opinion the petitioner was susceptible to psychological coercion, thereby preventing consideration of the same by the jury.

See also *People* v. *Jones,* 42 Cal. 2d 219, 266 P. 2d 38, where it was held reversible error to prohibit a psychiatrist from testifying that the type of mentality that committed the crime in question was one type and the defendant, *Jones,* was of another type. In the case of two 12 year old boys charged with murder a psychiatrist testified that one of the boys would admit "whatever he thought was expected so that he could get out of the immediate situation." Similar testimony was not permitted in the case at bar. See *In the Matters of Gregory W. and Gerald S.,* 19 N. Y. 55, 224 N. E. 2d 102.

The majority opinion (in the case at bar) of the Supreme Court of Illinois cites *Miller* v. *Pate,* 300 F. 2d 414 and *People* v. *Miller,* 13 Ill. 2d 84, 103, as authority for precluding the offered psychiatric testimony, but in that case the prosecution was permitted to elicit "expert" testimony that paint was blood, which this Court struck down in *Miller* v. *Pate,* 386 U. S. 1. A case of this sort can hardly be deemed as compellingly persuasive.

In an offer of proof made after the denial of certain testimony in behalf of Hester, a portion of what the psychiatrist would have testified to is as follows [R. 2332-2334]:

> Mr. Feldman: ". . . Now, concerning the question that was objected to by the State and the objection was sustained by this Court, as to whether or not the doctor had an opinion, based upon a reasonable degree of medical and psychiatric certainty, concerning the susceptibility of Lee Arthur Hester to psychological and mental coercion, the doctor would have testified as follows: That he does have such an opinion. What is your opinion, Doctor? My opinion is that Lee Arthur

Hester is an extremely dependent personality of limited intelligence, has an abnormal fear of physical injury, and is especially terrified of large and older males."

Mr. Feldman: "This is linked to his family background, his relationship to his father and older brothers, these individuals have effectively taught Lee Arthur Hester to exercise caution in dealing with older males and entertain a lively respect for their strength and force, this fact, coupled with low intelligence, makes him extremely susceptible to very moderate pressure from male authority figures, any kind of threat would terrorize Lee Arthur Hester far beyond his normal range of response, conversely, any promise would be seized gullibly.

"Under these circumstances the probability of a dictated confession cannot be ruled out, indeed, it has a high degree of probability."

Mr. Flynn: "Objection to the offer."

The Court: "Sustained."

Mr. Feldman: "Now, concerning the question about People's Exhibit Number 30, in evidence, whether or not the doctor has an opinion as to what type of person committed the crime as alleged in the confession, he would say, yes, he does have an opinion. What is that opinion, Doctor? The person who committed the crime as stated in the confession is a psychotic." (In a previous offer of proof the offer was that the psychiatrist would have testified, if permitted, that in his opinion the petitioner was not a psychotic." [R. 2362-2327]).

Mr. Flynn: "Judge, that—"

The Court: "Do you object?"

Mr. Flynn: "Yes, object."

The Court: "Sustained. Go on."

Mr. Feldman: "Now, referring to the hypothetical question that I phrased, and, of course, not going into it again, but saying—"

The Court: "His answer to the hypothetical question?"

Mr. Feldman: "His answer to the hypothetical question would be yes, he has an opinion. What is that opinion? The person who committed the crime described in the hypothetical question was a psychotic."

Mr. Flynn: "Same objection."

The Court: "Same ruling, sustained."

Mr. Feldman: "And then the question concerning during his interview and examination with the defendant, Lee Arthur Hester, under the influence of sodium amytal, did he question him concerning complicity in the murder of Josephine Keane."

The Court: "He would have answered yes?"

Mr. Feldman: "He would have answered yes."

Mr. Flynn: "Objection."

Mr. Feldman: "And the last question, did you, while under the influence of sodium amytal, did you ask him whether or not he killed Mrs. Keane? He would say, yes."

Mr. Flynn: "Yes?"

Mr. Feldman: "Yes, that he asked him that question. And what was his answer? His answer was an unequivocal denial, no. He was quite vehement and steadfast in his replies to this question."

The Court: "That is what the doctor would answer?"

Mr. Feldman: "That is what the doctor would answer."

Mr. Flynn: "Same objection."

The Court: "The State objects. The objection is sustained."

There is no justification for the exclusion of at least a portion of the testimony.

III(b).

It Was a Violation of Due Process to Refuse to Permit Defense Counsel to View and Inspect the Complete Police Report, Police Complaint Form and Notes, Memoranda and Test Data Made Available to the Prosecution by the Police but Not to the Defense, the Results of Such Test Data Being Heavily Relied on by the Prosecution as It Related to Certain Important Physical Evidence Before the Jury.

The trial of this cause involved numerous scientific tests concerning blood, hair and other items. The police officers making the tests testified they made notes during the course of the tests. Yet the defense was denied the right to see these notes and other data even though timely pre-trial motions were made and subpoenas duces tecum served. [CLR 43-44, 63-68, 113-118]; [R. 1-8, 23-24].

Even when the officers were on the witness stand and admitted making notes and "forgetting" to bring them, the Court ruled the same did not have to be produced, even though readily available. [R. 1660, 1691-1696, 1826-1836, 1856-1857].

Once the so-called tests by the crime lab were run virtually all of what was possible to test was consumed so that it was impossible for the petitioner to make independent tests, hence the great importance of the test notes and

memoranda. The trial Court knew this and even assured defense counsel at a pre-trial hearing on a motion to produce these notes (which was denied) that the same could be seen at trial, by saying that " . . . when these respective witnesses testify from the crime laboratory they will have their files with them and you can make your proper perusal." [R. 70-71]. This assurance was never complied with, for at trial, when the crime lab technician was asked for his notes the court sustained a prosecution objection to their production. [R. 1856-1857].

There is much similarity here to *Miller v. Pate*, 386 U. S. 1, where the Court at footnote 1. quoted from petitioner's motion (which was denied) to inspect certain undershorts, allegedly stained with blood, which was really paint.

The crime lab technician who testified for the prosecution said that he found type A bloodstains on the petitioner's clothing. A doctor called by the prosecution as their own witness testified that the clumping of certain A and anti-A sera and the clumping of certain B and anti-B sera indicated the presence of blood type AB, a type not belonging to the petitioner (who is O) nor to the victim who was A. [R. 1853-1854, 2072-2080]. (Testimony of Principe and Dr. Levine). This obvious conflict between two prosecution witnesses demanded an inspection of the data requested by the petitioner so as to inquire into the credibility of the technician's testimony.

The fair trial contemplated by due process was therefore denied the petitioner. What harm could inspection of the requested notes and memoranda have caused? See *Giles v. Maryland*, 386 U. S. 66, where a hearing was ordered to determine if the defendant was denied information useful to him and known to the prosecution only, to preclude false

information from going uncorrected in violation of the Fourteenth Amendment. There can be no fairness in judicial proceedings when vital evidence is not available to both prosecution and defense alike. The failure to make such evidence available to the petitioner was also a Sixth Amendment violation since the petitioner was thereby prevented from fully confronting the witnesses against him and from having the effective assistance of counsel, who could use such evidence in cross examination. See also *Brady* v. *Maryland*, 373 U. S. 83; *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842. Nor can it be argued that the petitioner must first show that the requested information was beneficial (or had a likelihood of being so) to him before the obligation of giving over such information attaches, for how can one know what may be beneficial to him without first having the right to examine that which he feels will assist him. This game of hide and go seek that prosecutors play must come to an end.

IV.

Was There a Lawful Search and Seizure of the Defendant's Clothing and Articles Contained Therein Subsequent to an Arrest Made by a "Dope Pusher" Policeman Whose Own Testimony Showed the Lack of Reasonable Grounds and Probable Cause to Make Such an Arrest?

It is contended that Hester was arrested shortly after 8:00 A.M. on April 21, 1961, by Officers Teller and Prunekle in the hallway outside room 306 [R. 1111-1130, 1137-1165, 1166-1192, 2828-2843, 2844-2855]. From that time forward, Hester was in police custody so that even if the arrest took place later that day, seizure of the petitioner's clothing was illegal.

The petitioner contends that the trial court erred in denying his petition to suppress evidence because:

1. The warrantless arrest of the petitioner was invalid since the arresting officers did not have reasonable grounds to believe the petitioner committed the offense, and

2. the arresting officers gave false, conflicting and contradictory testimony concerning facts surrounding the arrest and such testimony casts grave doubt upon the validity of the arrest, and

3. even if the arrest were valid, the later seizure and examination of petitioner's clothing *after* he was taken into custody constituted an illegal seizure.

Let us proceed to examine the above.

1. THE ARREST WAS INVALID—

Mrs. Keane was murdered on April 20, 1961 and the petitioner was not questioned or taken into custody until April 21, 1961 [R. 1122-1125]. In fact, the police did not even know of Hester until April 21 and his arrest was no more than the singling out of the petitioner from among 2600 students at his grade school, and some 2,000 high school and continuation school students attending class on the same school grounds as the grade school. [R. 2212-2213]. The facts surrounding Hester's arrest shows that Teller and Prunckle shockingly failed to engage in even a cursory investigation and literally arrested the first student with whom they came into contact. The facts show that they arrested Hester on nothing but rank, unsupported hearsay regarding matters not even relevant to the crime in question.

Teller and Prunckle arrived at the Lewis-Champlin school around daybreak on April 21, 1961, and searched the school area for evidence until 7:00 A.M. [R. 1112-1114, 1168-1169]. At 7:30 A.M. they questioned a school clerk, Rita Considine, in and about the school office about her knowledge of sex violators in the school. Mrs. Considine mentioned petitioner's name as one she understood had been accused of such an act a week before. Mrs. Considine did not know Hester nor did she know the name of the accuser (allegedly a student) involved in that act. Teller and Prunckle inquired no further than Mrs. Considine regarding such alleged act. Hester was never confronted by school officials regarding the alleged act, he was never questioned about it and no accuser came forward to complain of Hes-

ter. In fact, the record indicates that if such an act occurred at all, Hester was not the person involved. [R. 1078-1081, 1082-1111, 1111-1191].

Another teacher, Virginia Fritsch, entered into the Teller, Pruneckle, Considine conversation and shortly thereafter accompanied Teller and Pruneckle to room 306. On the way to room 306 Miss Fritsch said something about Hester being a disciplinary problem [R. 1121-1122]. Teller and Pruneckle talked briefly with Miss Webster, Hester's teacher in room 306 [R. 1123], then with Theresa Cooper, a classmate of Hester [R. 1364-1365] and then questioned the petitioner in the hallway outside room 306 and in the balcony of the school assembly hall, during which time Hester repeatedly denied killing Mrs. Keane. During this questioning period Hester explained a scratch in his left ear, an abrasion or cut on the little finger of his left hand and minute stains on his clothing called bloodstains by Teller and Pruneckle. [R. 1125, 1127-1128, 1176-1179].

Teller described the stains as being one-half the size of the pupil of an eye and some of which Pruneckle said he did not see at all [R. 1125, 1127-1128, 1176-1179]. None of the so-called "physical evidence" referred to during the trial (hair on clothes, lipstick on jacket, blood and several stains on underwear) were observed by Teller and Pruneckle when they questioned Hester [R. 1128-1130, 1198-1199]. In fact Hester was not wearing his jacket during the questioning period in the third floor hallway and in the assembly hall balcony [R. 653].

Miss Fritsch told Teller and Pruneckle that she saw Hester in the hall alone on April 20 [R. 1085]. Miss Fritsch then went to room 306 to get Hester's school records and

these records were then examined by Teller and Pruneckle in the presence of Miss Fritsch [R. 1088-1090].

Hester explained that on April 20 he was on his way to room 308 to see Mr. Broyls (a teacher) and that this was when Miss Fritsch saw the petitioner alone just before noon on April 20. Mr. Broyls verified Hester's account of why he (Hester) was in the hall on April 20 [R. 1091-1092].

After leaving the balcony, Teller and Pruneckle took Hester to the principal's office and turned him over to other police officers. No warrant was as yet issued for Hester's arrest (nor was one ever issued) [R. 1137]. Later, Hester was taken from school by police officers and brought to the Audy Home where his clothes were taken from him and sent to the Chicago Crime Laboratory for testing [R. 621, 655].

In brief then, the petitioner was arrested by Teller and Pruneckle on the unsupported gossip of Rita Considine about an *alleged* sex violation that in no way implicated Hester other than by innuendo (and which the officers made no effort to verify) [R. 1119-1120], minute stains (about certain of which Teller and Pruneckle contradicted each other) and a finger and ear scratch. This was the sum and substance of their investigation—they talked to no others, looked for no evidence and made no attempt to verify any statement made to them although they had every opportunity to do so. The rape investigation of the month before during which the police made a general roundup of dozens of boys in Hester's neighborhood (and which completely absolved Hester) was not to be considered in determining the reasonableness of the arrest and the trial judge so stated [R. 1203].

In substance, Hester was arrested because of a couple of scratches and small stains on his clothing, a condition prominent on most of the students at Lewis-Champlin school. The arrest standards employed by Teller and Prunekle required that almost every student be arrested in the fashion of Hester.

Teller and Prunekle *did not* arrest on reliable hearsay to the degree required by *Draper* v. *United States*, 358 U. S. 307. In fact, the "information" received from Rita Considine was unreliable and groundless on its face *and the officers made no effort to check the Considine "information"*. The Considine information was not even of the quality supplied by an informer whose reliability had been previously established or independently corroborated, a procedure authorized in *People* v. *Beatlie*, 31 Ill. 2d 257; *People* v. *Durr*, 28 Ill. 2d 308; *People* v. *LaBostrie*, 14 Ill. 2d 217; *People* v. *Tillman*, 1 Ill. 2d 525. Hester's name was mentioned [R. 1119, 1122], an inquisitorial flame was lit and the officers literally "grabbed" the first "guy" whose name was mentioned in an uncomplimentary manner. Had Mrs. Considine mentioned a name other than Hester (and certainly she could have), no doubt the same result would have followed.

The Considine information was not sufficiently accurate to lead the officers to the petitioner as required by *Wong Sun* v. *United States*, 371 U. S. 471. Teller and Prunekle acted on the "imprecise suggestion" of Rita Considine and they made an arrest. As to the bloodstains, had they been observed shortly after the crime, as a result of hot pursuit, then, perhaps, more justification would have existed for further inquiry. But these stains were not observed until a day later, making it more reasonable and logical to con-

clude that whoever killed Mrs. Keane would have promptly changed his clothes. As they were, the stains offered flimsy and the only possible grounds for the arrest of Hester. Since the stains were not observed until the next day, it was more reasonable to conclude that they were stains not related to the crime.

Hester's school day did not end until 12:00 o'clock noon, affording ample time and opportunity for the officers to appear before a magistrate to secure an arrest warrant and return to the school before the petitioner could leave. There were numerous police officers on the premises who could have been assigned to observe the petitioner until a warrant could be secured. There was a four hour interval between the time of arrest (8:00 A.M.) and noon and the officers could have used this time to check out the Considine information and to make a further investigation before arresting Hester.

During this four hour interval, Hester could not have interfered with police investigative efforts nor could he have destroyed evidence (it being remembered that his jacket upon which the lipstick mark, etc. were found, was under the blackboard and would remain there until noon). This position finds ample support in *Wong Sun* v. *United States*, 371 U. S. 471.

It was not impractical for the officers to secure a search warrant as was the case in *People* v. *Faginkrantz*, 21 Ill. 2d 75. Rather, the instant case can be likened to *People* v. *Erickson*, 31 Ill. 2d 230 where the court held that it was not impractical to secure a warrant for an episode that occurred as late in a Court day as 3:00 P.M. There was no obstacle to Teller and Prunckle securing a warrant and there was no explanation by the State as to the existence

of any such obstacle or other reason for not applying for a warrant.

The constitutional validity of the search and seizure depends upon the constitutional validity of Hester's arrest and

> " . . . whether that arrest was constitutionally valid depends in turn upon whether, *at the moment the arrest was made,* (emphasis added) the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge *and of which they had reasonably trustworthy information* (emphasis added) were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck* v. *State of Ohio,* 379 U. S. 89.

2. The Arresting Officers Gave False, Conflicting and Contradictory Testimony Casting Grave Doubt on the Validity of the Arrest.

The record is overburdened with such testimony.

(a) Teller testified that he and Pruneckle had a conversation with Rita Considine but Pruneckle said he never had a conversation [R. 1170].

(b) Teller testified that he and Pruneckle did not look at Hester's school records and grade sheets but Virginia Fritsch testified that they did look at those records [R. 1089-1090, 1172, 2831-2832, 2846].

(c) Teller first admitted seeing Hiram Broyls outside of room 308 [R. 633-634] and later denied seeing Mr. Broyls [R. 1125].

Pruneckle denied talking to Hiram Broyls (Broyls verified later that Hester was in Broyls' room, 308, on April 20 [R. 1177]), but Broyls testified that he talked with Teller on April 21 and told him that Hester *did* come to his (Broyls') room on April 20 [R. 1133-1136, 1178, 2595-2597, 2833]. Miss Fritsch also testified that she heard Broyls make such statements to Teller or Pruneckle [R. 1092]. Hester's own testimony also verifies what Broyls told Teller [R. 453, 2359]. Also, Pruneckle testified that he saw Teller engage in a conversation with Mr. Broyls outside room 308, Broyls classroom, thus contradicting Teller. [R. 1178-1179].

(d) Teller and Pruneckle denied the third degree methods they used in questioning Hester outside room 306 and in the balcony of the assembly hall. [R. 1137-1145, 1171-1191].

(e) Teller and Pruneckle contradicted each other as to the location of bloodstains on the defendant's clothing [R. 1127-1128, 1175].

The conflicting and contradictory testimony referred to above casts graver doubt on the reasonableness of Hester's arrest and the truthfulness of Teller's testimony when we recall Teller's own serious brushes with the law. It is to be recalled that just prior to arresting Hester, Teller was tried and acquitted for conspiracy to sell and for sale of narcotics [CLR 207-294]. Teller had a strong motive to make his arrest stick because he wanted to redeem himself as a police officer. It is not too remote to believe that he was overzealous in his arrest and less than honest in his testimony. This assertion becomes more believable when we examine the material contradictions in Teller's testimony and weigh this against the additional factor that in November, 1966 Teller was again tried in a Federal Court for peddling narcotics, but this time he was convicted and

given an 18 year sentence. The trial judge denied Teller an appeal bond for fear that Teller would leave the country. It cannot be overemphasized that it was this same Teller who set in motion all of the events that culminated in the petitioner's conviction.

The prosecution recognized that the fact that Mr. Broyls verified Hester's coming to room 308 (Broyls room) on April 20, 1961 adequately explained Hester's being in the hallway on that date. During the hearing on the motion to suppress the confession, the court refused to allow defense counsel to inquire of Teller as to his conversation with Broyls following Teller's admission that he saw Mr. Broyls on April 21 [later denied by Teller and Pruneckle, R. 633-634, 1125, 1177]. Teller later testified for the State in rebuttal and denied that Broyls joined the conversation outside room 308, a direct contradiction of previous testimony. [R. 2833]. The trial court refused to allow defense counsel to inquire as to whether Teller ever talked to Broyls on April 21, 1961. [R. 2833, 2848].

The testimony of an arresting officer during a hearing on a petition to suppress evidence is critical to the prayer of such a petition and the Courts recognize the need for credible testimony from police officers in such cases. See *People v. Catavdella*, 31 Ill. 2d 382, a case involving a motion to suppress evidence where the court, at page 388 said:

> "... the testimony of Officer Nicolini casts grave doubt upon the validity of the arrest."

We have already detailed the obvious and material contradictions and falsehoods in the testimony of Teller and Pruneckle and

" . . . where substantial constitutional rights are involved, the record should be clear that these rights were not abridged. . . . *People* v. *Catavdella*, 31 Ill. 2d 382 at page 388."

The contradictory and false testimony of Teller and Prunekle and the limitations the trial court placed on the inquiry conducted by defense counsel during the motion to suppress the evidence of themselves indicate that these constitutional rights of the petitioner and referred to in *People* v. *Catadella* were abridged.

" . . . The conflicting nature of Nicoline's testimony can hardly be explained as a mere mistake *and the State admits that it would not be unreasonable to infer that Nicoline testified falsely at the preliminary hearing* . . . " 31 Ill. 2d 382, at page 388.

Police officers are hired to make arrests and they attempted to substantiate that arrest when called upon to testify. They falsely denied going to Mr. Broyls' room (308) because what they were told by Broyls would have substantiated a major part of the petitioner's story (why he was in the hall on April 20, 1961) and would have cast doubt on the reasonableness of their arrest.

Teller, a once acquitted and once convicted dope peddler gave testimony in an effort to support an invalid arrest. Judicial notice is taken of the adverse effects of drugs on the ability to tell the truth, *People* v. *Boyd*, 17 Ill. 2d 321 and *People* v. *Crump*, 5 Ill. 2d 251. Is a seller of narcotics to be accorded more credibility?

3. The Seizure of Petitioner's Clothes and Their Examination and Testing by the Chicago Crime Laboratory After the Petitioner Was in Custody Was Illegal.

The later search of the defendant, his clothes and the contents thereof that took place at the Andy Home and the testing at the Chicago Crime Lab were too remote in time and place to have been made incidental to the arrest. This later search failed to meet the test of reasonableness required under the Fourth Amendment to the Federal Constitution. *People* v. *Catardella*, 31 Ill. 2d 382, *Ker* v. *California*, 374 U.S. 23.

The Fourth Amendment refers to

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches *and* seizures (emphasis added) shall not be violated. . . ."

The Fourth Amendment refers not only to illegal searches but extends the same constitutional safeguards to illegal seizures and this Court has recognized this proposition. See *Preston* v. *United States*, 376 U.S. 364, in which the court offers a clear and concise answer to whether a search and seizure is too remote in time or place to be incidental to an arrest.

The Court in *Preston* said, at page 368:

> ". . . The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used

any weapons in the car or could have destroyed any evidence of a crime . . . "

The Court in *Preston* found that the search without a warrant was too remote in time or place to be incidental to an arrest and *failed* to meet the Fourth Amendments test of reasonableness. To the same effect see *People* v. *Erickson*, 31 Ill. 2d 230 and *People* v. *Gates*, 35 Ill. 2d 584, which cite *Preston* with approval.

The most recent pronouncement of the United States Supreme Court regarding a warrantless search and seizure after the accused is taken into custody is *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216. In that case the court struck down evidence secured through a warrantless search and seizure conducted while the accused were in custody inside the courthouse and their automobile was parked on the street outside. This court discussed *Cooper* v. *California*, 386 U.S. 58, and concluded that *Dyke* was like *Preston* and unlike *Cooper*. The petitioner contends that the facts in the instant case likewise present a *Preston* situation.

Hester was arrested and searched a day after the crime in question and there was no reasonable or probable cause to believe that evidence relating to that crime would be found on his person at that time. *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216. Further, Hester was not taken before *any* judicial officer at all for 14 days following his arrest. Certainly, there was ample time to do so, ample time to apply for a search warrant and impose the scrutiny and protection of such judicial officer. [R. 9].

The taking of Hester's clothes and their later examination and testing involved an invasion of Hester's physi-

cal person after he was taken into police custody. This court has recently looked into that *Preston* type of situation where the post arrest search and seizure relates to the physical person and not an instrumentality or object of an accused. See *Davis v. Mississippi*, —— U.S. ——, 22 L.Ed.2d 676, where the taking of the petitioner's fingerprints during his detention was held to have violated the Fourth Amendment since they were the product of the illegal detention and were thus improperly admitted into evidence.

In fact, Hester's situation is much more deficient in meeting Fourth Amendment requirements than the situation referred to above in *Davis*. Fingerprints "are an inherent and unchanging characteristic of the man" and "can be exactly and endlessly reproduced". The post arrest search and seizure of Hester, however, involved tangible property, not unchanging physical characteristics, wrongfully seized and "so tainted as to be forever inadmissible as evidence against him." As argued elsewhere in this brief, the alleged "scientific" reliability of such evidence was of highly questionable validity and relevance. Therefore, its seizure after a warrantless arrest should even more stringently follow Fourth Amendment requirements, for physical evidence of the type taken from Hester can be manufactured, misunderstood or misinterpreted where on the other hand, fingerprints and their "credibility" cannot be blown out of all proportion by the use of "sophisticated scientific techniques" designed to impress a lay-jury (this was the obvious effect of the scientific techniques employed by the state—bombarding of metal filings, slide pictures of human hair, etc. [R. 1623-1656, 1722-1728, 1740, 1882,

2512-2517]) and, therefor, fingerprints have a much greater degree of reliability. Nevertheless, *all* evidence obtained by illegal searches *and* seizures are inadmissible in a State Court, a proposition clearly stated in *Mapp* v. *Ohio,* 367 U.S. 643, 655.

Thus, whether it is the post-custodial search of an accused's car or his physical person, the requirements of the Fourth Amendment are equally applicable. It cannot be argued that Hester's clothes were taken from him during the "investigatory stage" for

> "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions". "We made this explicit. . . . . in *Terry* v. *Ohio,* 392 U.S. 1, 19 . . . . . " *Davis* v. *Mississippi,* —— U.S. ——, 22 L.Ed. 2d 676, 681.

Your Honors are therefor urged to apply the mandate of *Preston* to post-custodial searches and seizures from the physical person. Certainly, the safeguards afforded the accused regarding post-custodial searches and seizures of and from automobiles have no greater justification than the safeguards that should be afforded an accused regarding post-custodial searches and seizures of and from the physical person of an accused.

Application of the *Preston* doctrine to post-custodial searches and searches of and from the person of an accused will greatly minimize the possibility of "planted", "manufactured" or "irrelevant" evidence. Almost any physical object can be related in some fashion to the physical aspects of a crime and used to overwhelm a jury (as wit-

ness the bombardment of metal particles with refracted light in the instant case). The necessity of appearing before a magistrate for the necessary warrant will at least insure that a record of what is desired to be searched and for what reason will be presented to the particular judicial officer.

Because the evidence was admitted without a satisfactory showing that it was obtained in compliance with the Fourth Amendment, the petitioner's petition to suppress the evidence in the trial court should have been sustained.

(h) Conclusion

An innocent and illiterate 14 year old boy with the mentality of an 8 year old was convicted as a result of coerced, involuntary, incredible and untrustworthy "confessions", one oral and one written, both of which are so closely related in time and in the manner of their taking as to be inseparable, after the acquisition of which certain physical evidence secured through an illegal search and seizure was fashioned to fit the statements contained therein.

All this has kept an innocent boy in the Illinois State Penitentiary for almost eight years. Even in the light of those decisions in pre-*Miranda* and *Escobedo* days the petitioner's conviction cannot stand. To permit the same to stand would not only be in disregard of the precedent for its reversal (especially Haley and Gallegos) but also would signal an end to this age of enlightenment during the existence of which the states have been repeatedly advised that they must obey the Fourth, Fifth and Sixth Amendments to the Federal Constitution.

WHEREFORE, from the above and foregoing several premises the petitioner prays that the judgment of the Court below be reversed.

Respectfully submitted,

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Counsel for Petitioner

Received a copy of the above and foregoing Petitioner's Brief this 3rd day of June, 1969.

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(i) Appendix

Constitutional Provisions Involved.

United States Constitution, Fourth Amendment

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Criminal Code of Illinois, Ill. Rev. Stat., 1959, Chap. 38, Sect. 660

When an arrest is made without a warrant, either by an officer or by a private person, the person arrested shall, without unnecessary delay, be taken before the nearest magistrate in the county who will hear the case, for examination, and the prisoner shall be examined and dealt with as in cases of arrest upon warrant.

Illinois Family Court Act, 1959, Chap. 23, Illinois Revised Statutes

Section 2001

All persons under the age of 21 years, shall, for the purpose of this Act only, be considered wards of this State and their persons shall be subject to the care, guardianship and control of the court as hereinafter provided. . . .

. . . . Neither the fact that a child has been before the children's court for hearing, nor any confession, admission or statement made by him to the court or to any officer thereof while a male is under the age of 17 or a female under the age of 18, shall ever be admissible as evidence against him or his interests in any other court or proceeding. . . .

. . . . This Act shall be construed to the end that the care, custody and discipline of the children brought

before the court shall approximate as nearly as possible that which they should receive from their parents, and that as far as practicable they shall be treated not as criminals but as children in need of aid, encouragement and guidance. . . .

(The entire Section 2001 is not set out here as it is quite lengthy. The applicable portions are set out verbatim).

Section 2012

Whenever a dependent, neglected or delinquent child is committed to an institution, association, or a county department of welfare, the court shall appoint the president, secretary or superintendent of the institution, association, or county department of welfare, guardian over the person of the child and shall order the guardian to place the child in the institution or with the association, or county department of welfare whereof he is such officer and to hold the child, care for, train and educate it subject to the rules and laws that are in force governing the institution, association, or county department of welfare. Whenever a delinquent child is committed to the Youth Commission, the court shall appoint the chairman of the Youth Commission guardian over the person of the child.

Section 2014

The court may in its discretion in any case of a delinquent child permit such child to be proceeded against in accordance with the laws that may be in force in this State governing the commission of crimes or violations of city, village or town ordinance. In such case the petition filed under this act shall be dismissed.

Section 2021

When a male child under the age of 17 years or a female child under the age of 18 years is arrested

with or without a warrant, such child shall be taken directly before the court having jurisdiction under this Act; or if the child is taken before a justice of the peace or police magistrate, it shall be the duty of such justice of the peace or police magistrate to transfer the case to such court, and the officer having the child in charge to take the child before such court, and, in any case, the court may proceed to hear and dispose of the case in the same manner as if the child had been brought before the court upon petition as herein provided. However, if the child is arrested on a traffic violation of which a justice of the peace or police magistrate has jurisdiction, such child may be taken into such justice of the peace or police magistrate court rather than into the court having jurisdiction under this Act and such justice of the peace or police magistrate shall promptly advise the family court of any convictions in such matters. In any case before it, the family court shall require notice to be given and investigation to be made as in other cases under this Act, and may adjourn the hearing from time to time for that purpose.

Chapter 38, Sect. 6-1, Illinois Revised Statutes, 1961, Effective January 1, 1962

> No person shall be convicted of any offense unless he had attained his 13th birthday at the time his offense was committed.

The following is a list of exhibits presently in the custody of the State's Attorney of Cook County, Illinois, who was permitted to retain the same for safekeeping. The Supreme Court of Illinois ordered these exhibits produced for oral argument there. After the decision by that Court the exhibits were returned to the State's Attorney of Cook County.

I. Prosecution Exhibits:

No. 5 —A coat

No. 6 —Panties

No. 7 —A group exhibit—stockings & garter attachments

No. 9 —A girdle

No. 10—A gray skirt

No. 12—A brassiere

No. 13—A slip

No. 14—A jacket

No. 15—Boy's trousers and belt

No. 16—Boy's underwear

No. 17—A shirt

No. 19—Boy's Red Sweater

No. 20—2 black shoes and one pair of socks

No. 21—A boy's undershirt

No. 30—Confession

II. Defense Exhibits (in possession of prosecution):

No. 16—Boy's shirt (same as People's Exhibit #17 offered and received into evidence)

No. 17—Boy's red sweater (same as People's Exhibit #19 for identification—not offered into evidence by prosecution)

No. 18—Mrs. Keane's blouse (same as People's Exhibit #8 for identification—withdrawn by prosecution)